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United States

Circuit Court of Appeals

For the Ninth Circuit

LOCAL 36 OF THE INTERNATIONAL FISHERMEN AND
ALLIED WORKERS OF AMERICA, JEFF KIBRE,
GILBERT ZAFRAN, CLIFFORD C. KENNISON, F. R.
SMITH, GEORGE KNOWLTON, OTIS W. SAWYER,
W. B. McCOMAS, HARRY A. McKITTRICK, ARTHUR
D. HILL, C. LLOYD MUNSON, CHARLES McLAUCH-
LAN, ROBERT M. PHELPS, BURT D. LACKYARD,
and RAY J. MORKOWSKI,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

In Six Volumes

VOLUME IV

Pages 1423 to 1902

Upon Appeal from the District Court of the United States
for the Southern District of California
Central Division

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(Testimony of Jeff Kibre.)

The Court: Yes, I sustained the objection to these on the ground that they were remote. "I" on the ground they were remote and immaterial. And K, M and P——

(Some documents were handed to the court by the clerk.)

The Court: This was the witness Waissbord. Exhibit K, Mr. Rubin, Minutes of Barracuda Meeting May 6, 1943; is that in evidence otherwise? I remember P and M and N.

X, Mr. Clerk, and X-1.

* * *

The Court: You lodged your objection yesterday?

Mr. Rubin: Yes, the objection formally was made. Each and every part of the offer of proof is objected to on the ground of immateriality and remoteness, and the fact that it is self-serving, doesn't tend to prove or disprove any of the [2799] issues in the case.

The Court: The objection is sustained, except as to Exhibit K. I will reserve ruling on that. There has been some testimony on it, and I don't recall what the foundation was, or whether there was some testimony or not. I will rule on K later. [2800]

* * *

The Court: I am going to overrule the objection and let it in. [2810]

* * *

(The motion picture referred to was marked Defendants' Exhibit BB and received in evidence.)

* * *

The Court: We will now proceed. The defendants are offering a motion picture which will take about 20 minutes. The jury is instructed that it is to be received for the limited purpose of showing the general nature of the operation of a fresh fisherman in catching fish, and for no other purpose.

Proceed.

Mr. Kenny: It takes the number BB?

The Court: Yes. It will be Exhibit BB in evidence.

(The motion picture referred to was received in evidence and marked Defendants' Exhibit BB.) [2811]

The Court: Proceed.

JEFF KIBRE

called as a witness by and on behalf of the defendants, having been previously sworn, resumed the stand and testified further as follows:

Mr. Margolis: If I recall correctly, your Honor, there was a question which had been put but not answered when we recessed last night. I would like to have that read.

(The portion of the record referred to was read by the reporter as follows:

“Q. (By Mr. Margolis): The question refers to an agreement to maintain minimum price. Was that an agreement in writing or was that an agreement which was just an exchange of statements, oral statements?

(Testimony of Jeff Kibre.)

“A. The latter. That is, it was simply an agreement on the part—a meeting of minds was reached on the part of those present.

“Q. Will you tell us what was said on that subject?

“A. Yes. I pointed out to the fishermen that——

“Mr. Dixon: If the court please, I object. I don’t think that is at all responsive. Here, again, this witness is starting out, ‘I pointed out.’ He has been asked a question of what was said, which we don’t think is material, but we are not objecting to it at this time until we find out what the course of the examination is.

“The Court: The question is what was said, and when you said, ‘It was pointed out,’ that is a conclusion of the witness.

“Q. (By Mr. Margolis): Say what you said. Say, ‘I said,’ ‘He said,’ and so forth.”)

Redirect Examination

(Resumed)

By Mr. Margolis:

Q. You recall we were talking about the 1946 Barracuda Conference.

A. Yes, that is what I recall now.

Q. Now, will you answer that question?

(Testimony of Jeff Kibre.)

A. To the best of my recollection I recall that this is what transpired so far as statements: Bruce Martin made a statement and said something to this effect, that the fishermen couldn't possibly sign an agreement because they were dealing with something they didn't have, namely, fish in the ocean; and it was in answer to that that I got up and spoke and I said what the fishermen were seeking to do was to bargain for an agreement—— [2813]

* * *

The Court: All right. Proceed.

The Witness: So I told the fishermen—I mean those present that what the fishermen were endeavoring to do was to obtain an agreement from the fish dealers for the fish which they would deliver when they harvested that catch, an agreement similar to those which had been well established in agriculture for future deliveries, and then I went on to explain that——

Mr. Dixon: Now, if the court please, I rise again to object, because this is precisely what we feel is immaterial and self-serving. We are now apparently to hear another [2814] speech.

Mr. Kenny: I don't think this is fair referring to the testimony as a speech. He is relating what happened at a meeting and of course speeches take place, and I think counsel should be admonished not to belittle this witness' testimony by saying he is orating. He is making an honest effort to relate what took place at the meeting. I think we are entitled to have the jury admonished not to have the witness constantly belittled in this way.

(Testimony of Jeff Kibre.)

Mr. Dixon: If the court please, I believe this is redirect, and as I understand it redirect is confined to the extent of the cross-examination, and anything that is necessary to be explained in that cross-examination. I certainly submit that this is not an explanation in any sense of the term of anything that was gone into on cross-examination.

The Court: Well, I think the witness is getting a little more on the exposition side than the factual side. He is to state what the agreement was, in other words, what was said as to what the agreement was, and not what the argument was leading up to it, nor what his reasons were, but what was the agreement, if there was any made. I understand he said there was an agreement made at this meeting.

You recall you testified there was an agreement that the O.P.A. ceiling price would be the price at this meeting? [2815]

The Witness: It was just simply a meeting of the minds, that is, an agreement on the part of those present, that they should seek to have the OPA price remain.

The Court: You wanted to explain something about that and I have permitted counsel to ask you what was said with relation to the agreement.

Mr. Margolis: That was all said with relation to the agreement. That is part of the discussion.

Mr. Dixon: We submit it doesn't have any reference to the agreement, your Honor.

(Testimony of Jeff Kibre.)

The Court: I do not think so. Maybe the witness doesn't have anything else to say, I don't know.

Mr. Margolis: It is very hard to know. If I were a witness, it would be hard for me to know where to draw a line.

The Court: It is always very difficult to know where to draw the line.

Mr. Margolis: I would like the witness to go on with the answer, but I am not in a position to advise him. The only way I know, what we have offered at least is everything that was said with relation to the agreement. Now where the line is to be drawn, your Honor, I don't know.

Mr. Dixon: If the Court please, I believe this witness has already testified that there was an oral agreement, and I think that was the extent of my cross-examination.

The Court: Yes, that is right. [2816]

Mr. Dixon: I don't know what further need be said about it.

Mr. Margolis: If your Honor please, if there was an oral agreement, what was called for on cross-examination was a conclusion, was there an oral agreement.

The Court: Now you are asking him what was said to constitute the oral agreement. That isn't argument as to why they did this or why they did that or why something else.

Mr. Margolis: It is the sum total of the conversation that determines whether there was an agree-

(Testimony of Jeff Kibre.)

ment or what the nature of the agreement was. We are not in the position to separate it, your Honor.

The Court: I think the witness understands what we are driving at.

Mr. Margolis: I frankly do not.

The Court: Do you understand?

The Witness: Well, to tell you the truth, I am getting a little confused. I think maybe I can try.

Q. (By Mr. Margolis): Do you have anything to add to your answer, trying to confine yourself within the ruling as you understand it?

A. I am afraid I can't quite apply that.

The Court: Very well. Proceed, counsel.

Q. (By Mr. Margolis): I would like to put this question, your Honor: [2817] Will you tell us the rest of the conversation?

Mr. Rubin: Objected to on the same grounds.

The Court: Objection sustained.

Q. (By Mr. Margolis): Now on cross-examination you were asked by Mr. Dixon whether the dealers told you that they would not go along with the union's proposals. I want to ask you in connection with Exhibits A and B, which are, you will recall, the letters dated June 11, 1946, one addressed to the fresh fish dealers of the port of San Pedro and the other the reply, whether those were submitted at any time simply as proposals drafted by the union alone.

A. No. These were proposals that were drafted jointly by the dealers and the union representatives.

Mr. Dixon: If the Court please, I object to that. It has already been gone into on direct examination.

(Testimony of Jeff Kibre.)

The Court: Yes. It was gone into on redirect. It is not a new matter opened on cross-examination.

Mr. Margolis: The reason, your Honor, that I wanted to clarify this is that I objected to a question as assuming facts not in evidence.

The Court: It was gone into on direct examination, how those happened to be drafted, and so forth, at the meetings that were held.

For the benefit of the jury, the rule is that there is [2818] direct examination and there is cross-examination which permits touching upon the subject matters touched in the direct but if on cross-examination some new matter is brought up then the party who produced the witness may re-examine him concerning the new matter only.

Q. (By Mr. Margolis): At the meeting of June 15, the minutes of which are in evidence as Government's Exhibit 228, and the part as Defendants' Exhibit V, do you recall what you said and what was said at that meeting with respect to the dealers' reply of June 14 in which the proposals of June 11 were rejected?

Mr. Dixon: If the Court please, I object to that as having been already gone into on direct examination.

The Court: I think it was gone into on redirect too. I remember this witness testifying to it.

Mr. Margolis: Not with regard to this meeting.

The Court: On the meeting where the dealers' letter was considered? I think that was one of the things he testified to, that the dealers' letter was

(Testimony of Jeff Kibre.)

received and it was received while the meeting was in progress, or just before it, and he talked about it and read the whole letter.

Mr. Margolis: Your Honor please, here is my recollection of what the record shows: On direct examination I inquired about what was said and an objection was sustained on the ground that the minutes were sufficient to indicate what [2819] was said. On cross-examination Mr. Dixon opened the subject up but went into only part of what was said—I have not had the transcript for yesterday; it was just handed to me this morning so I don't have the page reference—but my notes show that he went partially into that discussion. I want to get the entire discussion in.

Mr. Dixon: If the Court please, I merely asked this witness on cross-examination whether the suggestions contained in one of the exhibits, the so-called reply of the dealers, was presented to the meeting. Your Honor will recall that.

The Court: That is right. Then when you had this witness on the stand the other day, over the objection of the Government I permitted him to testify in response to your questions that the whole letter was read to the dealers at that meeting. So the objection is sustained. Let us move on.

Q. (By Mr. Margolis): Now in the minutes of June 15, reference is made to statements of a complimentary nature made by you to the union. Will you state what you said in that regard? [2820]

(Testimony of Jeff Kibre.)

The Court: What compliments did you pay the union on the meeting of June 15, was the question.

The Witness: The main compliment that I paid them was with reference to certain proposals that were adopted at that particular meeting to strengthen, as they put it, the setup of the local union, particularly their financial condition, which had always been bad, and I complimented the membership there on the actions which they had taken. I thought that they had taken constructive action to improve the functioning of their union, to such an extent that the service to the members would be materially better.

I further complimented them on the conduct of the strike. I felt that they had conducted it in a manner very worthy of the best traditions of our organization. It has been conducted without any serious difficulties. It had been completely peaceful. And that all in all they had conducted themselves in a very responsible manner.

Mr. Margolis: We have no further questions.

* * *

Recross-Examination

By Mr. Dixon:

* * *

Q. (By Mr. Dixon): Is it a fact that Exhibit AA was the only contract that was submitted by Local 36 to the dealers in Santa Monica?

The Court: When?

(Testimony of Jeff Kibre.)

Q. (By Mr. Dixon): In 1944 during these discussions and negotiations you talked about that were had during that period.

A. This is the contract that we submitted at the meetings in the Western Seafood Institute when the conciliator was present to all the dealers in California. This was not submitted to the Santa Monica dealers, as I recall.

Q. What is the fact as to whether this is the contract or proposed form of contract that was submitted to the Santa Monica dealers in 1944—the San Pedro?

The Court: Submitted to the San Pedro dealers or Santa Monica? What is your question now?

Mr. Andersen: He changed in the middle, I believe.

The Court: You went from Santa Monica to San Pedro very quickly.

Q. (By Mr. Dixon): As I understood it from your examination yesterday, Exhibit AA was the contract or form of contract [2823] submitted to the Santa Monica dealers in 1944, is that correct?

A. No, no.

Q. Was that the type that was submitted to all the dealers in the southern part of California, in 1944 by Local 36?

* * *

The Witness: We may have submitted other contracts, but this contract was submitted to the dealers in connection with the meetings held in the

(Testimony of Jeff Kibre.)

Western Seafood office in the spring of 1944, at which time the conciliator was present. This is the contract.

Q. (By Mr. Dixon): I had previously asked you, Mr. Kibre, on cross-examination as to what other agreements, if any, were submitted to the Santa Monica dealers other than the two contracts that were signed by the Bay Fish Company and the other company in Santa Monica, do you recall that?

A. I don't recall that, no.

Q. Well, this is a question asked you by Mr. Margolis [2824] yesterday referring to Exhibit AA:

“And this is the agreement which you had reference to in answering Mr. Dixon when you said a different agreement, not a similar agreement, to the one submitted to the Santa Monica dealers was submitted to the other dealers, is that right?”

And you answered: “That is right.” Did you mean in your answer that Exhibit AA was the contract or form of contract that was submitted to the other Santa Monica dealers, as well as to all other dealers in the southern part of California?

Mr. Margolis: I object to that as assuming facts not in evidence, that there are any other Santa Monica dealers.

Q. (By Mr. Dixon): Are there just the two dealers in Santa Monica?

A. As far as I know, there are only the two dealers.

(Testimony of Jeff Kibre.)

Q. All right. That clears up that point. Then this was the exhibit or form of contracts, Exhibit AA, that was submitted to all the dealers in Southern California in 1944, including the Santa Monica dealers, is that correct?

A. I don't know whether the Santa Monica—you see, this agreement was submitted at the time that we had the meetings in the Western Seafood—

The Court: He wants to know whether the Santa Monica dealers were included or not.

The Witness: That is right. [2825]

Q. (By Mr. Dixon): Was that the only form of agreement that was submitted to the dealers in the Southern California area in 1944?

A. This is the only contract that I had any connection with in the spring of 1944 that was submitted. I wouldn't know. Maybe there were others.

Q. If there were any other forms of contract submitted, would you know about it?

A. Not necessarily.

Q. You were the International representative at that time, were you not, charged with the responsibility of helping the locals in their negotiations?

* * *

Q. (By Mr. Dixon): I hand you what is marked for identification as next in order, Government's Exhibit 57.

The Court: Government's 57 for identification.

(The document was marked Government's Exhibit No. 57, for identification.)

* * *

(Testimony of Jeff Kibre.)

Q. (By Mr. Dixon): I will ask you to examine the same and state whether you ever saw that contract or proposed form of contract before.

Mr. Andersen: That contract is unexecuted, isn't it?

A. I don't recall too well, but I do remember this, that the Local was working on a number of agreements at the time, and as I recall there probably were at least a half dozen contracts prepared from time to time by the Local.

Q. (By Mr. Dixon): All during the year 1944?

A. Oh, yes.

Q. Can you state to the court and the jury whether this contract or form of contract ever came to your attention?

A. Yes, I think it did. I am not positive.

Q. Will you state the circumstances under which it came to your attention?

A. I say as far as I know the Local was working on a number of contracts and they probably brought this to my attention for me to go over.

Q. Can you specify the time to the best of your recollection when it first came to your attention?

A. I think quite likely this contract was prepared in the summer of 1944 when the Local was seeking to enter into [2827] negotiations with the San Pedro cannery.

Q. Does the notation at the top of this exhibit "Revised for Cannery and Dealers" mean anything to you in connection with the time at which it was—

A. If I can look at the agreement I believe I will be able to tell pretty well.

(Testimony of Jeff Kibre.)

Q. All right.

A. As I recall now the Local was trying to prepare a contract which would be suitable both for canners and dealers, fresh fish dealers, and I would say this: that over a period of months they must have prepared and revised half a dozen agreements. Now, I would be coming in and out of town; I would be here maybe for a week and then out of town, and I would come in and they would show me these various agreements. I think this was the one prepared in the summer of '44 in connection with when the Local was seeking to negotiate with the canners.

Q. What does the reference to the dealers on the contract refer to?

A. Yes, as I say, they were trying to—they simply apparently took the agreement which had been prepared for the dealers at one time or another and were revising it so it would be suitable for dealers and canners.

Q. In any event, this was one of the forms of contract that was prepared by Local 36 in 1944, was it? [2828]

A. I would say it is one of a dozen contracts which they were working on tentatively.

Q. And can you state whether or not this form was prepared before or after Exhibit AA before referred to?

A. I really don't know exactly. I say to the best of my recollection that was prepared during the summer of '44 in connection with possible negotiations with the canners. [2829]

(Testimony of Jeff Kibre.)

Q. But you have no actual knowledge as to whether this was one of those contracts or forms of contracts submitted to the dealers in 1944?

A. I don't know. It may have been submitted to the dealers. The only agreement I know definitely about is the agreement that was submitted at the time the actual meetings took place. There were a great many tentative drafts of agreements prepared and informal discussions had with the dealers.

Mr. Dixon: We offer Exhibit 57 in evidence, your Honor.

Mr. Margolis: Objected to on the ground it is incompetent, irrelevant and immaterial.

Mr. Dixon: It is one of the forms of contracts.

The Court: Objection is overruled. Admitted.

(The document referred to was received in evidence and marked Government's Exhibit No. 57.)

Mr. Dixon: At this time I would like to read to the jury a portion of Exhibit 57, which bears at the top in pencil the words "Revised for Cannery and Dealers, Southern California Fish Stabilization Agreement," and begins as follows:

(At this point counsel read portions of Government's Exhibit 57 to the jury.)

Q. (By Mr. Dixon): You were asked yesterday, Mr. Kibre, by Mr. Margolis, whether at any time did the union ever give notice to either [2830] of the two dealers covered by Government's Exhibits 240 and 244, that they should not purchase fish from any fisherman.

(Testimony of Jeff Kibre.)

Q. And your reply was, I believe, that they did not give such notice to the Santa Monica dealers, is that correct?

A. I said, to the best of my knowledge I didn't know of any such notice.

Q. You testified yesterday, when the Court asked you, do you know, you answered as follows: "I am fairly well acquainted with the situation out there; yes."

Is that your answer that you wanted the jury to get from the question put to you by the Court?

A. Well, I meant it in this sense, that I am here in this area, or at that particular time, at least in '44 and up until '45, I am here for a couple of weeks at a time every couple of months and that I get reports, and it is my knowledge based on such reports, and from going to Santa Monica maybe once every three or four months and meeting with the union over there.

In other words, I don't have an exact knowledge of every day-by-day event. It would be impossible for me to have such [2831] knowledge.

The Court: Do you wish now to say that you do or do not know whether or not any notice was given? That is the point.

The Witness: I don't know of any notices myself; no.

The Court: Very well.

Mr. Dixon: In connection with Government's Exhibits 240 and 244, the Government offers what

(Testimony of Jeff Kibre.)

has been previously marked for identification as Government's Exhibits 245, 243 and 246 in evidence.

(Exhibiting documents to counsel.)

Mr. Dixon: And we will also ask leave to withdraw Exhibit No. 252 from that exhibit for identification and place the same number upon the original of said document and offer 252 for identification in evidence, together with the other exhibits named.

The Court: You are withdrawing the carbon copy of Exhibits 252?

Mr. Dixon: That is right.

The Court: And offering the original in place and instead of 252?

Mr. Dixon: That is right.

The Court: 252 is now in evidence?

Mr. Dixon: Not yet. It was marked for identification but was not offered in evidence. This is the one we are talking about, the carbon copy.

(The document referred to was passed to the Court.)

The Court: Have you seen Exhibit 252?

Mr. Margolis: Yes, your Honor.

The Court: And you are offering this in evidence?

Mr. Dixon: Yes, your Honor.

The Court: He is now offering the original letter of 252 in evidence in place and instead of the carbon which was heretofore marked for identification as 252.

(Testimony of Jeff Kibre.)

Mr. Margolis: It is identical?

The Court: No, it is not identical with the carbon. There is an insert in the body of the letter. It has signatures attached to it. Otherwise it appears to be identical.

What were the other exhibits? I will be looking at those.

(The documents referred to were passed to the Court.)

Mr. Margolis: We have no objection to the substitution, your Honor.

The Court: You are now offering 243, 245 and 246?

Mr. Dixon: That is right, as well as 252.

* * *

The Court: Admitted.

(The documents referred to were received in evidence and marked Government's Exhibits 243, 245, 246 and 252 respectively.)

Mr. Dixon: Exhibit 252 is a letter on the letterhead of the International Fishermen & Allied Workers of America, Berth 73, San Pedro, California, to the Santa Monica Seafood Company at Santa Monica, California, dated August 29, 1944, and reads as follows:

(At this point counsel read Government's Exhibit 252 to the jury.)

Mr. Dixon: Exhibit 245, marked "Supplemental Agreement," reads as follows, being dated August 30, 1944:

(Testimony of Jeff Kibre.)

(At this point counsel read Government's Exhibit 245 to the jury.)

Mr. Dixon: Exhibit 246, dated May 28, 1946, carbon copy of a letter addressed to the Bay Fish Market, Santa Monica, California.

(Whereupon counsel read from Exhibit 246 to the jury.)

Mr. Dixon: Exhibit 243 is a carbon copy of the same letter, dated May 28, 1946, addressed to the Santa Monica Seafood Company at Santa Monica, California.

* * *

Mr. Dixon: 414 and 413. We offer Exhibits previously marked for identification Government's 413 and 414 in evidence, your Honor.

The Court: Admitted.

(The documents referred to were marked Government's Exhibits 413 and 414, and were received in evidence.)

Mr. Dixon: We ask that these be shown to the jury at this time. They are rather long. They can be passed along and done rather quickly.

The Court: You have got two documents there, why don't you start one in the back row and one in the front row.

(Whereupon the exhibits referred to were handed to the jury.) [2835]

* * *

(Testimony of Jeff Kibre.)

Redirect Examination

By Mr. Kenny:

Q. The question was whether you have seen these exhibits now being circulated to the jury. This is the first time you have ever seen them?

A. I haven't ever seen them. I don't even know what this is. I am sitting here consumed with curiosity. [2836]

* * *

Mr. Kenny: We will have to await the answer until we can see what is being shown to the jury.

* * *

Mr. Kenny: We are talking about 414 and 413, your Honor.

The Court: All right.

(Slight delay while jury is looking at exhibits.)

Mr. Kenny: Can the witness see the exhibits now and answer my question?

(A paper was handed to the witness.)

The Court: That is what number?

The Witness: 413.

The Court: The witness has been handed Exhibit 413.

The Witness: No, I never saw or heard anything about this. This is the first time I have seen them.

Mr. Kenny: That is all. 413 is the same as 414.

(Testimony of Jeff Kibre.)

The Court: The bailiff is now handing the witness Exhibit 414.

The Witness: I never saw these before either.

* * *

The Court: The witness may step down.

Mr. Kenny: I just have one brief excerpt from this contract that I would like to read to the jury. Counsel read part of the contract. [2837]

* * *

(Whereupon counsel read portions of Exhibit No. 57 to the jury.)

Mr. Dixon: Your Honor, may I just read one other paragraph in view of what Mr. Kenny has read? It is very short.

* * *

The Court: The jury understands that they will have the whole contract at the appropriate time.

(Whereupon Mr. Dixon read a portion of Exhibit 57 to the jury.) [2839]

* * *

CLIFFORD C. KENNISON

Called as a witness by and in behalf of the defendants, having been first duly sworn, was examined and testified as follows:

* * *

The Clerk: State your name.

The Witness: Clifford C. Kennison.

The Clerk: Your address?

The Witness: 274 Viewland Place.

The Clerk: San Pedro?

The Witness: San Pedro.

(Testimony of Clifford C. Kennison.)

Direct Examination

By Mr. Margolis:

Q. Mr. Kennison, are you one of the defendants in this case? A. Yes, I am.

* * *

Q. You live at 274 Viewland Place?

A. I have a trailer at that address.

* * *

Q. Are you a fisherman? A. Yes.

Q. Is that what you do for a living?

A. For the most part; yes.

Q. Do you do anything else for a living?

A. Well, sometimes I supplement my income from labor, casual labor.

Q. What do you mean by casual labor?

A. Oh, such as washing the bottom of a boat, painting the bottom of a boat.

Q. That sort of thing, is that right?

A. Yes, sir.

Q. When did you start working as a fishermen?

A. In 1939.

Q. Have you worked as a fisherman continuously since that time doing, in addition as you indicated, casual labor? A. I have.

Q. What sort of work did you do before that?

A. Laborer, casual labor, you might say.

Q. Do you own a boat? A. No, I do not.

Q. Have you ever owned a boat? A. No.

Q. Do you own a share of a boat?

A. Not even a share.

(Testimony of Clifford C. Kennison.)

Q. Have you ever owned a share in a boat?

A. No.

Q. Then all of the time that you have worked as a fisherman have you worked on other persons' boats? A. Yes, I have.

Q. And on what kind of a basis?

A. On a share basis.

Q. In other words, you receive a certain share of the catch, is that right? A. Yes.

Q. Now during the time that you have been fishing since 1939, have you been fishing cannery fish or market fish or both? [2842]

A. Both.

Q. Could you give us an indication of the proportion?

A. Well, I would estimate three-quarters of the time fishing for cannery and about one-quarter for markets.

Q. One-quarter of the time for fresh market fish and the rest of the time for cannery fish, is that right? A. Yes. [2843]

Q. Now, what have been your earnings as a fisherman since 1939?

Mr. Dixon: If the court please, we object to that question as being wholly irrelevant and immaterial.

The Court: Objection sustained.

Mr. Margolis: I would like an opportunity to be heard on that, your Honor.

The Court: I think you have enlightened me in connection with that matter in the course of the

(Testimony of Clifford C. Kennison.)

nine or ten weeks we have been hearing the various phases of this case. The objection is sustained.

Q. (By Mr. Margolis): What proportion of your earnings have come from cannery fish and from fresh market fish?

Mr. Dixon: Same objection, your Honor.

The Court: Overruled.

The Witness: Can I have the question?

(The question was read by the reporter.)

A. I can't give you a definite proportion on that, because I have no way of—an estimation, I would say in about the same proportion as the time I fished.

Q. (By Mr. Margolis): I see. Have you fished on just one boat or on a number of boats?

A. I have fished on a number of boats.

Q. About how many?

A. At least a dozen. [2844]

Q. Were those boats all small boats or all large boats, or were some small and some large?

A. Small boats, I believe you would classify them.

Q. What have been the sizes of the crews on the boats on which you have fished?

A. Generally two; sometimes three.

Q. When you say two and sometimes three, you mean, for example, when you say "two" you mean one in addition to yourself, and when you say "three" you mean two in addition to yourself, is that right? A. That's right.

(Testimony of Clifford C. Kennison.)

Q. On these boats, when they have caught fresh market fish have you been familiar with the method of disposal of that fish to the dealers?

A. Yes, I have.

Q. Tell us what the practice has been with regard to sale of fresh market fish on those boats on which you have fished to the dealers. [2845]

* * *

A. As we come from fishing we tie up at the fish market dock, and then one of the crew proceeds to the dealers that he knows.

* * *

A. (Continuing): Go to a dealer that we know perhaps better than other dealers, state that we have fish on the boat in our catch. Ask him how much he will take. If he doesn't take them all, then we proceed to other dealers and see if we can dispose of the balance of the catch.

* * *

Q. On these boats on which you have fished you say that a fisherman goes to a dealer that he knows. State whether or not there was any practice on these boats with regard to giving preference to certain dealers or going to certain dealers first.

A. Yes. [2846]

Q. State what that was.

* * *

The Witness: We have favored dealers, dealers that we know, buyers we know who buy of us.

* * *

(Testimony of Clifford C. Kennison.)

The Court: I think it has. Is there anything else you do about selling the fish in practice with reference to these dealers?

The Witness: Well, yes, there is. [2847]

The Court: What is it?

The Witness: We find out what they are going to give us for those fish.

The Court: That is, you go to your favored dealer and find out what he is going to pay you?

The Witness: Generally that is so.

Q. (By Mr. Margolis): Then what happens? He says he is going to pay a certain price. Then what do you do?

A. Proceed to fill his order.

Q. And if there is any fish left over then you go to another dealer, is that right?

The Witness: That is right.

The Court: In your experience have you gotten different prices for the same species of fish on the same day from different dealers? A. No.

Q. Did you mean by that that you always get the same price? Is that what you mean?

A. That is what I mean. [2848]

* * *

Q. (By Mr. Margolis): Before you went fishing did you ever inquire about the price of fish that was being paid at the time that you went fishing?

A. Yes, I have.

Q. When you have come back from fishing, has the price always been the same or has it sometimes

(Testimony of Clifford C. Kennison.)

been different from the price that you were informed about at the time you went fishing?

* * *

The Witness: Many times it is different.

* * *

The Court: Sometimes it is the same?

The Witness: Sometimes.

The Court: When it is different it is more or less?

The Witness: Generally less. [2850]

* * *

Q. You have testified that there have been times that you have inquired about the price of fish before you went fishing. A. Yes.

Q. Now that price that you learned, state whether that was the price being paid at that time for fish being brought in at that time or whether that was the price which was being offered to you when you brought in fish after your trip.

Mr. Dixon: If the Court please, I object to that question on the further ground it is entirely too broad. What [2851] this witness catches may not be the same thing that is being sold or the price of the fish that he goes out fishing for.

The Court: It is complex and compound. I do not know what you are driving at.

Before you go out fishing, do you make a deal to sell your fish that you are going to catch, is that what you want to know?

The Witness: No.

Mr. Margolis: That is one of the things.

(Testimony of Clifford C. Kennison.)

Mr. Rubin: He has answered it no, your Honor.

The Court: All right. [2852]

* * *

Q. (By Mr. Margolis): Did you have a conversation during the month of June, 1946, with a man by the name of Pizzo? A. Yes.

Q. Do you recall when that conversation took place in June?

* * *

A. The first week in June.

Q. (By Mr. Margolis): All right. Where was it?

A. Flight Brothers Yacht Anchorage in San Pedro.

Q. Incidentally, you have always done all of your fishing from San Pedro, is that right?

A. No.

Q. Where else have you fished from?

A. I have fished out of Newport, Santa Monica, San Diego, Astoria; Newport, Oregon.

* * *

Q. Going back to this conversation, who was present besides yourself and Mr. Pizzo?

A. Members of his crew.

* * *

Q. Will you tell us what was said?

A. I asked Mr. Pizzo if he had registered for picket duty. His answer was no. I again asked if he would cooperate with us in maintaining the picket line. His answer was that they had too much work on the boat. That was a rather short answer, and it terminated the conversation.

(Testimony of Clifford C. Kennison.)

Q. Did you have a subsequent conversation with him? A. I did.

Q. When was that?

A. A few days later. Practically the same conversation. I went farther explaining about our position, asking co-operation from the small boat fishermen and making the duty less on the picket line by having more pickets. His answer was, again, that he was busy on the boat. And that terminated the conversation.

Q. Do you know whether his boat went fishing during the month of June, 1946?

A. Yes, I do.

Q. Did it? A. It did.

Q. Did it get clearance from the union before it went fishing?

A. No, it didn't get any clearance. [2856]

* * *

Q. My Mr. Margolis: Was any action taken at all by the union or by yourself or any of the other defendants in this case with regard to his fishing?

* * *

A. No.

* * *

Cross Examination

By Mr. Dixon:

Q. Mr. Pizzo was not a member of Local 36, was he, Mr. Kennison? A. No.

Q. You say you had these two different conversations with him on two different days in which you asked him to do some picketing, is that correct?

* * *

(Testimony of Clifford C. Kennison.)

Q. Just what did he tell you, Mr. Kennison, when you asked him to do picket duty?

A. He said he was busy working on his boat.

Q. Did he tell you that he would do some picket duty with you against the San Pedro dealers?

A. No, he didn't say he would.

Q. Did he tell you that he didn't want to do any picket duty.

A. No, he didn't say that.

The Court: Did he do any picket duty?

The Witness: No.

* * *

Q. (By Mr. Dixon): It is a fact, is it not, Mr. Kennison, that Mr. Pizzo did do some picket duty during the strike in June?

A. I have no way of knowing who all done picket duty, but I have been given to understand that he didn't. [2859]

* * *

The Court: Sustained.

I understand you to say then that you don't know whether he did any picket duty or not?

The Witness: That would be correct.

* * *

Q. (By Mr. Dixon): Then if Mr. Pizzo testified that you told him in one or two of these conversations that you have described that you had with him that "you better do picketing" you would say that you didn't have that conversation with him, is that correct?

OTIS W. SAWYER

called as a witness by and in behalf of the defendants, having been first duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Andersen:

Q. Your name is Otis W. Sawyer?

A. Yes, sir.

Q. You are known as Tom Sawyer?

A. Yes.

Q. And the person referred to in these proceedings as Tom Sawyer is you, Otis W. Sawyer?

A. Yes, sir.

Q. You are one of the defendants in this case?

A. Yes, sir.

Q. In 1945 or 1946 you were a fisherman?

A. Yes, sir, I was fishing most of the time in 1946 and most all of the time in 1945. [2861]

Q. And you are a member of Local 36, the defendant union here? A. Yes, sir.

Q. How long have you been a commercial fisherman?

A. I started fishing commercially November 1, 1944.

* * *

Q. Where do you live, by the way?

* * *

A. My home is Torrance, California.

Q. You are married, are you? A. Yes, sir.

Q. Family? A. Yes, sir.

(Testimony of Otis W. Sawyer.)

Q. What did you do before you were a fisherman? A. I was an oil worker.

Q. In this general locality?

A. Yes, sir. I worked for the Bankline Oil Company.

Q. And when you started fishing, did you fish as a fisherman or did you own a boat, or how did it work?

A. I started as a fisherman, yes, sir.

Q. In this locality? [2862]

* * *

A. No, sir, at San Pedro.

Q. When you fished I assume that you also fished on the usual share basis?

A. I did; yes, sir.

Q. Usually how many men would be on the boat that you would fish on? A. Two of us.

Q. And these boats work on the same general share basis that has been mentioned here, is that correct?

A. Yes, sir; all boats work like that.

Q. They all work under the same general plan?

A. Yes, sir.

Q. Did you ever own a boat? A. Yes, sir.

Q. What was the name of it?

A. Mary Jane.

Q. When did you buy it?

A. I bought that boat some time the first part of 1945.

Q. What did you pay for it?

(Testimony of Otis W. Sawyer.)

A. Well, I paid actually cash for the boat \$3000 and I had about \$1400 in equipment.

Q. About what?

A. About \$1400 in equipment on it. I paid about \$4400 altogether. [2863]

Q. Did you use that boat in fishing?

A. Yes, sir, when it was running.

* * *

Q. How long did you own the boat?

A. Well, I owned the boat a little over a year.

Q. During that year did you use it in the local fisheries? A. Very little. [2864]

Q. About how much of that time did you use it?

A. About a third of the time that I owned a boat.

Q. What did you do the other two-thirds of the time?

A. I was trying to repair that engine I had in it most of the time.

Q. Did you do any other fishing during that time? A. I did, off and on.

Q. When you weren't trying to fix the engine you were fishing on another boat, is that it?

A. Yes, sir.

* * *

Q. You bought the boat when?

* * *

The Court: He said the early part of 1945.

Q. (By Mr. Andersen): When did you sell it?

A. Some time in the spring of 1946. That was some time in April or May, I forget when it was.

(Testimony of Otis W. Sawyer.)

Q. Did you sell it or was it foreclosed?

Mr. Dixon: Now, if the Court please——

The Witness: I had to sell it.

The Court: He sold it, he said. The whole thing is immaterial.

Mr. Andersen: May it please the Court, we want to show through this witness, and we think it is material——

Mr. Rubin: We submit that if there is to be an offer of proof it should be made out of the presence of the jury.

The Court: Yes. I apprehend what the offer is and what you are going to offer to prove in connection with the matter.

Mr. Andersen: I think the Court's apprehension is substantially correct.

The Court: But I do not think it is material, counsel, at all. He might have had a boat and only fished with it one day, and he might have spent all his time repairing it and the reason for it might have been because he was poor, because he wasn't making any money, or because he just liked to do it.

Mr. Andersen: He didn't sell it because he wanted to sell it, Judge.

The Court: And there isn't any way that anybody can test the veracity of his testimony in that respect, so the objection is sustained.

Mr. Andersen: With respect to the latter statement, he of course could be subjected to cross examination on any aspect of it. [2866]

The Court: The objection is sustained. Let's get on.

(Testimony of Otis W. Sawyer.)

Q. (By Mr. Andersen): How long did you fish as a commercial fisherman altogether, either for yourself or other people?

A. Well, altogether it was around two years. That is the whole total time working on my boat and fishing for someone else and the elapsed time that went on.

Q. Did you have any particular markets that you sold your catch to?

A. Yes, I had favored markets.

Q. What was the arrangement, if any, that you had with them for the sale of your fish?

A. There was no arrangement whatever. I never made an arrangement.

Q. Did you ever try and make an arrangement with them?

A. Sometimes I would go in to one of them and see if he would buy fish or not, but they would never say they would buy it.

Q. Would you explain the general method you used in selling your catch?

A. Well, I would get up on the dock and see if I could get a reasonable price for my fish.

* * *

Q. (By Mr. Andersen): Well, then, when you came in with a load of fish, just explain in your own words how you would dispose of them.

A. I would come up to the dock and tie up and get up on the dock and go talk to those dealers that I knew better than others.

(Testimony of Otis W. Sawyer.)

Q. Where would you have to go to talk to the dealers? A. Walk in their markets.

Q. Walk to their markets? A. Sure.

Q. And usually how far away from where your boat was tied up would their markets be?

A. Well, that is a problem. Sometimes you tie up at the end of Pedro dock, and sometimes you tie up in the middle. That dock must be around 400 foot, 500 foot long.

Q. And would you walk to their places of business? A. Yes.

Q. And you would dicker with them for the sale of the fish, would you?

A. I don't know what you mean by "dicker." I would just ask them how much they were paying.

Q. Was there ever any variance from one dealer to the next? [2869]

* * *

The Witness: There was. There was one or two times, the only times I was fishing that I ever got any differences in price between them.

Q. (By Mr. Andersen): One or two times?

A. Yes; not over that.

Q. In all of those years? A. Yes.

Q. The rest of the times would the price be the same? A. Yes, I always found it the same.

Q. By the way, who had the mortgage on the boat you owned?

Mr. Dixon: If the court please, I object to that as wholly immaterial.

(Testimony of Otis W. Sawyer.)

The Court: I take it that counsel knows the answer to that question or he wouldn't have asked it.

Mr. Andersen: Yes, your Honor, I know.

The Court: It would not be material unless the mortgage was held by the person to whom he was under obligation to sell his fish to.

Mr. Andersen: I think we can bring that out also.

The Court: I will overrule the objection, and if that is not the fact I will strike the answer and instruct the jury to disregard it. [2870]

Did you have a mortgage on your boat to the fellow you sold your fish to?

The Witness: Not my fresh fish, no. My canned fish.

The Court: You fished for canned fish too?

The Witness: Yes, to a certain extent.

Mr. Dixon: I renew my objection in view of the answer.

The Court: The objection is sustained. It is immaterial.

Mr. Andersen: May I argue that briefly, your Honor?

The Court: Counsel, I think we have been over that often enough that I have about as good an idea as I am ever going to have as to what your idea is of the case and the reasons for it. The objection is sustained. It is immaterial what his arrangement with the canner was.

Mr. Andersen: All right, your Honor.

(Testimony of Otis W. Sawyer.)

Q. (By Mr. Andersen): When you would come in with your fish, would you usually sell it to one dealer or more than one dealer?

* * *

A. No, I usually went—if I had a great deal of fish I would try to give, divide all my fish up to all the dealers; but if I had a limited amount I would try to sell to my best friends on the dock there.

Q. (By Mr. Andersen): Why would you do that?

A. Because when I got an overload sometimes these friends would take the rest of them.

Q. Otherwise you would split it among all of them?

A. Yes, I would; I would try to.

Q. Do you know a man named Falcone?

A. Yes.

Q. Did you have any discussion with him at any time regarding any picketing?

A. I believe I did.

Q. When did you have the conversation?

A. I don't know. I forget that. It might have been the first part of the strike, for all I know, but I don't remember.

Q. Do you remember where it was?

A. I think it was at the tanning tank there at the fish dock, I believe.

Q. Do you recall the conversation you had with him?

A. No, not word for word, I don't.

Q. Nobody can ever remember a conversation verbatim, but just the gist of it.

(Testimony of Otis W. Sawyer.)

A. I believe I asked him would he do or would he help us do some picket duty, and he said he would.

Q. Did you explain to him the reasons why?

A. He knew the reasons why. [2872]

* * *

Q. (By Mr. Andersen): Did you have one or more conversation with him?

A. I don't remember whether it was one or two. There might have been two.

Q. Do you know if he actually did any picketing?

A. Well, as far as walking the picket line he didn't, no.

Q. Do you know what, if anything, in the nature of picketing he did? A. Yes, I do.

Q. What was that?

A. He asked me if he—he come to me and asked if he did some picket duty could he work on his nets at the same time, and I said, "Of course you can. You come down in the afternoon from 6:00 to 12:00 if you care to and tan your nets then." [2873]

Q. Do what? A. Tan his nets.

Q. What do you mean by tanning nets?

A. They have a certain procedure that they make out a tan bark in hot water to tan their nets. [2874]

* * *

Q. (By Mr. Andersen): I direct your attention to the conversation you had with Mr. Falcone on the fish docks there, and ask you if at any time you ever told him that if you don't picket we might make it tough for you?

(Testimony of Otis W. Sawyer.)

A. I can't ever remember having said that statement. No, I didn't make any statement like that.

* * *

Q. (By Mr. Andersen): Do you know how long Mr. Falcone picketed, over what period of time?

A. Yes, I think he was there three, probably four [2875] times in the evening.

Q. Were you friendly with him?

A. Very friendly. Still am.

Q. You had some sort of a position with relation to picketing, didn't you?

A. I was on—one of the registration committee, yes, sir.

Q. During the period of the strike did you have many conversations with Falcone from time to time?

A. Yes, most every evening I talked to him.

Q. You got along with him in a friendly manner, didn't you?

A. Very friendly yet, yes, sir.

Q. Do you know a man named Chigi?

A. Yes.

Mr. Andersen: You will find the reference on page 945 of the record.

Q. (By Mr. Andersen): Do you recall having any conversation with him about picketing?

A. Yes, I think I talked to him one time about picketing.

Q. Do you remember where it was?

A. I think he was patching his nets there at the net drying rack, at the tanning bark tank.

(Testimony of Otis W. Sawyer.)

Q. Did you have any conversation regarding him, that is, [2876] Mr. Chigi, and he performing picket duty?

A. Yes, I asked him when he was going to do it. He said he would. He told me at the very first of the strike that he might do picket duty, and I wanted to know when he was going to do it.

Q. What did he say?

A. He said he had too much work, he couldn't do it right then.

Q. Do you know if he ever did any picket duty?

A. Well, I believe he did, but I can't be sure. I believe he did, though.

Q. Did you get along with him in a friendly way? A. Yes.

Q. Did you have any arguments or fights with him. A. I don't argue with anybody.

Q. I beg your pardon?

A. I don't argue with anyone.

Q. During the time that you fished did your earnings ever exceed \$1500 a year?

Mr. Dixon: I object to that, your Honor, as immaterial.

The Court: Objection sustained. [2877]

Cross-Examination

By Mr. Dixon:

Q. Now Mr. Falcone was not a member of Local 36, was he, Mr. Sawyer?

A. No, I don't believe he was.

(Testimony of Otis W. Sawyer.)

Q. And in your conversation with him, did you ask him to do some picket duty against the dealers there at San Pedro?

A. I don't know whether I asked him or not. I asked him whether he would cooperate and help us do some.

Q. Did you ask him as follows: "You fellows have to picket to go out again or else you have to stop fishing?"

A. Not in those words; no.

Q. Did you tell him in different words but to the same effect?

A. I don't know about the effect. I didn't talk in those words.

Q. Did you tell Mr. Falcone that he would have to do some picket duty if he wanted to go out fishing, or words to that effect?

A. No, I did not say that. I said it was customary for the fishermen to do some picket duty to get a clearance card to go fishing.

Q. Even though they were not members of Local 36?

A. That is true; yes.

Q. Did you ever have any conversation with this witness [2879] about where he could sell any fish that he caught after he got a clearance card from the union?

A. With which witness? Falcone?

Q. Yes, Falcone.

A. No, I never told him where he could sell any fish at. I think it was Newport or Santa Monica, but I never told him.

(Testimony of Otis W. Sawyer.)

Q. In other words, any fish that was caught by the fishermen who did the picket duty and got the clearance card could be sold at Newport or Santa Monica, is that correct?

A. I don't know. I didn't have anything to do with that at all.

The Court: Did you know where anybody could sell his fish if he caught it during the strike?

The Witness: Yes, sir. I understood they could at San Diego, Newport, Redondo Beach, Venice, half a dozen places, Santa Barbara, where they could have taken it if they wanted to.

Q. (By Mr. Dixon): You mean that the dealers who had signed the contract at those ports could?

A. No. It is all according to where the fishermen were fishing at, what would be their closest port.

Q. San Pedro was the closest port, was it not, from which Mr. Falcone went out in his boat? Wasn't that his home port? [2880]

A. I believe Falcone was fishing shark and his gang were fishing shark and hauling them to Los Angeles, the carcasses.

Q. Do you know whether Falcone brought any fish into the San Pedro port while you were on picket duty?

A. Yes, he did. He and his boys did bring in fish, that is, shark carcasses in, and he hauled them to Los Angeles, he told me.

Q. Was that the shark that were thrown overboard, do you know?

(Testimony of Otis W. Sawyer.)

A. I have seen lots of sharks thrown overboard; tons of it.

Q. Now did you have this conversation with Mr. Falcone: "If you guys don't picket we might make it tough for you?"

A. I don't remember that conversation; no.

Q. You don't remember it now?

A. I don't remember it at all; no.

Q. Do you remember whether you had a conversation with him in words substantially to that effect?

A. No, I wouldn't say I would say that to no one.

Q. Would you say that you didn't have such a conversation, Mr. Sawyer?

A. I would say I would not have such a conversation as that, yes, that is right. I did not have such a conversation. [2881]

Q. Now, Mr. Chigi was not a member of Local 36 either, was he?

A. I don't know. He might have been. I don't know whether he was or not.

Q. Did it make any difference whether a fisherman was or was not a member of Local 36, as to whether he had to do picket duty to get a clearance card?

A. Well, no, not to get a clearance card, but it made a difference whether he was a union member or not.

Q. Did you state to this witness that he could have no clear card because he got no picket, or words to that effect?

(Testimony of Otis W. Sawyer.)

A. I think it was customary for all pickets to have a certain amount of time, for all fishermen to have a certain amount of picket time, before they could go out.

The Court: His question is whether or not you said that.

The Witness: No, I don't know. It might have been something similar, but in those words, I never spoke to a man like that in my life.

The Court: Well, Mr. Chigi apparently had difficulty in speaking English.

The Witness: I know he did; yes.

The Court: You understood what he was saying though?

The Witness: Yes, sir, I understood him. I talked to him quite a few times. [2882]

Q. (By Mr. Dixon): Did you have any conversation with Mr. Chigi in which you told him that he could fish for three days if he did picket duty?

A. I think that was the way the committee explained it to me, that he had a certain amount of time set up in those days where you could only go out so many days to fish because we didn't have enough pickets. But the way the committee explained it to me, he was allowed so many days and he should come back again and do some more picket duty, four hours, until he was issued another card, something to that effect.

Q. Chigi got a clear card from the union?

A. I believe he did. I believe most of the fellows did.

(Testimony of Otis W. Sawyer.)

Q. And he went out fishing, did he?

A. I am pretty sure he went fishing.

Q. Did you tell Mr. Chigi where he could sell his fish when he went out after he got this clear card?

A. No.

The Court: You say the committee. What do you mean by the committee?

The Witness: There was a group of men, a strike committee. There was a group of men that acted upon each individual man's suggestion that he go out, or application that he go out, and this committee had allotted so many hours of picket [2883] duty to allow this person to go out, I think it was four hours every five days, something like that, because there wasn't enough picket men to go around.

The Court: All right.

Q. (By Mr. Dixon): Did you at any time tell Mr. Chigi that he would have to sell his fish to Martin at Newport?

A. No, sir, I did not.

Q. Now after he got this clear card the first time and came back into port, did you have any other conversation with him about doing picket duty again?

A. I might have, but I can't remember whether I did or not.

Q. Did you tell him, "Picket or you can't go fishing any more?"

A. I don't remember saying that to him; no.

Q. Would you say that you didn't say that, Mr. Sawyer?

(Testimony of Otis W. Sawyer.)

A. I won't say I didn't say that, but I say I can't remember whether I did or not.

Q. Then it is possible that you told——

A. It could have been possible.

Q. ——Chigi that he couldn't go fishing any more unless he picketed?

A. I was in no position to tell him anyway.

* * *

FORREST R. SMITH

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Andersen:

Q. Your name is Forrest R. Smith and you are one of the defendants in this case? A. Yes.

Q. And you are a fisherman by occupation?

A. Yes.

Q. How long have you been a fisherman?

A. Since I was about 12 years old. [2886]

Q. By that do you mean that you have been a commercial fisherman since that time?

A. Not entirely, no.

Q. Approximately how many years of your life, then, have been devoted to commercial fishing?

A. I fished from the time I was 12 years old until 1917, and I joined the Navy in the First World War. I came out of the Navy in 1920 and I worked on ferry boats and was in the garage business and radio business until 1934 or '35, along in that neigh-

(Testimony of Forrest R. Smith.)

borhood, and then I went back fishing again and I have been there ever since.

Q. You resumed fishing, then, in about 1935?

A. Yes.

Q. Where did you resume fishing?

A. San Pedro.

Q. And that is what is called your home port, is it?

A. Yes.

Q. Do you own a boat? A. Yes.

Q. What is the name of the boat?

A. The present boat I own, you mean?

Q. Yes. A. Irene F.

Q. What is the cost of the boat?

A. The boat originally cost me \$2,000. [2887]

Q. Is this the first, second or third boat you have owned?

A. Third boat.

Q. When did you buy this boat? A. 1941.

Q. Was the boat bought entirely by you or was it bought by you in company with somebody else?

A. I had a partner.

Q. Who was the partner?

A. A man by the name of C. P. Reed.

Q. Was he a fisherman too? A. Yes.

Q. Was the boat bought by your money or was it financed by any company?

A. It was financed in its entirety by the Coast Fishing Company of Wilmington.

Q. Coast Fishing Company of Wilmington?

A. Yes.

Q. What is their business?

A. Canneries. [2888]

(Testimony of Forrest R. Smith.)

Q. Up until the time of this strike and at the present time, you are engaged in fishing, are you, or, we will say, up until the time of the strike?

A. Yes.

Q. What is the method used for compensation? Is it the same as has been testified to so far in this case?

A. Yes, a share basis.

Q. What do you mean by a share basis?

A. Well, a share basis.

The Court: Don't we understand that? Does he mean something different?

Mr. Andersen: No, your Honor.

The Court: All right.

Mr. Andersen: I assume it may be stipulated, therefore, that everything else would be cumulative along the same line so far as the compensation is concerned?

The Court: On the matter of the share basis, do you want them to ask every witness here how he gets compensated and explain the share basis?

Mr. Rubin: We have no desire whatsoever.

The Court: Then you agree to the stipulation?

Mr. Rubin: Perfectly. [2889]

Mr. Andersen: Then it is stipulated all the fishermen are compensated as has been testified here?

The Court: On a share basis.

Mr. Andersen: On a share basis or lay basis.

Mr. Dixon: And there is a difference in the share depending on whether you are a boat owner or working on the boat.

(Testimony of Forrest R. Smith.)

The Court: I think that goes without saying. We have gone over that several times.

Mr. Andersen: I intend to go into the boat owner's share briefly with this witness, your Honor, but I will handle it briefly. I don't want to waste any more time than the Court does.

The Court: Unless it is something different. If it is just cumulative on the method used of dividing the share of the lay——

Mr. Andersen: This will be something different, your Honor.

The Court: This is a different situation?

Mr. Andersen: Well, no, but we will show by this witness that the boat gets a share also, but it is the share that the boat gets that I want to talk to the witness about.

Mr. Rubin: We will object to that as incompetent and immaterial.

The Court: You mean it is a different share?

Mr. Andersen: No, your Honor.

The Court: Let's move on.

Q. (By Mr. Andersen): When you are out fishing, your boat gets a share, doesn't it?

A. Yes.

Q. Now with respect to the share of the catch——

The Court: By the way, what is the crew on your boat?

The Witness: Oh, from two to four men.

The Court: That is, you and two others?

The Witness: Well, when I say from two to four men, that includes myself.

(Testimony of Forrest R. Smith.)

The Court: That includes yourself?

The Witness: Yes.

The Court: I see.

Q. (By Mr. Andersen): Now with respect to the amount of money which is the boat's share of the catch, which would be a share of the total, that is correct, isn't it?

A. I didn't quite understand it.

Q. What is the boat's share of the catch?

A. An equal share. For instance, if there are three of us on the boat and each man on the boat gets an equal share, and the boat gets an equal share; in other words, if they make a hundred dollars net after all expenses are taken [2891] out for the boat and there is three men on the boat, it is divided four equal ways and the boat gets \$25 and each man gets \$25.

Q. Now with respect to the repairing of the vessel, is the boat's share devoted to that expense?

A. Yes.

* * *

Q. Now with respect to the amount of repair work necessary on the hull of the boat, is the boat's share on an average, that is, the boat's average share of the catch, sufficient to take care of the normal repairs to the hull, motor and gear?

Mr. Dixon: I object to the question, your Honor. I think it is obvious—— [2892]

* * *

The Court: The objection is sustained.

(Testimony of Forrest R. Smith.)

Mr. Andersen: I don't believe this point has ever been argued up until the moment, your Honor.

The Court: I don't think that particular point has been argued, but it is immaterial, counsel.

Mr. Andersen: All right, your Honor.

Q. (By Mr. Andersen): On an average, Mr. Smith, what is the dollar cost per year for repairing your boat, your vessel and gear?

Mr. Dixon: Object to that, your Honor, as being immaterial.

The Court: Objection sustained.

Q. (By Mr. Andersen): With respect to your fishing practices what percentage is fresh and what percentage cannery fish?

A. Since the start of the last war it has been about 90 per cent fresh fish.

Q. 90 per cent what? A. Fresh fish.

Q. And then the rest is for the canneries, is that correct. A. Yes.

Q. Do you have any particular canneries, that is, fresh fish dealers, rather, with whom you do business? A. Yes.

Q. And who are they? [2893]

A. Catalina Fish Company and State Fish Company?

Q. They are down at the dock at Pedro, are they? A. Yes. [2894]

* * *

Q. (By Mr. Andersen): Do you have any understanding with them——

A. I have a verbal agreement, yes.

(Testimony of Forrest R. Smith.)

Q. What is it?

A. Well, the verbal agreement consists that I give them preference to my load of fish when fish are scarce, and when fish is plentiful they will take my surplus.

Q. They will take your surplus? A. Yes.

Q. Are you indebted to either of those markets?

A. At times.

Q. Were you indebted to them prior to the strike or within the year prior to the strike?

A. Yes.

Q. Under what circumstances did you become indebted to them? [2895]

A. I needed money for—to make a net, and I went to Catalina Fish Company and they advanced me the money.

Q. Is that a common practice? A. Yes.

Q. During your operations as a fisherman is it customary and necessary for you from time to time to borrow money in order to maintain yourself and your vessel? A. Yes.

Q. And how often during the past ten years have you found it necessary to borrow money?

Mr. Dixon: I object to that, your Honor.

The Court: Objection sustained.

Q. (By Mr. Andersen): Approximately how much of your time each year is devoted to repair work on your vessel?

Mr. Dixon: Object to that as being immaterial.

The Court: Sustained.

(Testimony of Forrest R. Smith.)

Q. (By Mr. Andersen): Do you fish the full year around? A. No.

Q. Do you follow any particular season?

A. Yes.

Q. What seasons do you follow?

A. I follow the swordfish season during the summer months and the mackerel season in the fall of the year, and [2896] sometimes I fish barracuda and fish——

* * *

A. (Continuing): And fish that run with swordfish during the summer. But I never fish through January, February and March.

The Court: Swordfish, mackerel and barracuda, generally, is that correct?

The Witness: And albacore.

Q. (By Mr. Andersen): Those are the four main fish you catch? A. Yes.

Q. Is there any particular reason why you don't fish through January, February and March?

A. Yes.

Q. What is that?

A. I use that period of the year to repair my hull, my boat in general.

Q. When you come in with a load of fish, will you explain the general practice in disposing of the catch?

A. We come into the dock, the fresh fish dock in San Pedro, and we tie up, and I go to my two favorite markets first. First I find out what the price of the fish is for that day, and then I find out

(Testimony of Forrest R. Smith.)

how much fish they want and need, and then if they don't take the load, take the complete load, why, then I go to the other markets and sell as much [2897] as I can to them. And then if I have any surplus I go back to those two markets and they generally, as a rule, take my surplus fish.

* * *

Q. (By Mr. Andersen): When you come in with a load of fish and sell it to four or five markets as you have indicated, is there any variation in the price you get for your fish?

A. No, never.

* * *

Q. I don't mean a variation from day to day, I mean on a day in any week or any month, on a day is there any variation in the price of fish from one dealer to the next? A. No.

Q. Have you ever had any conversations with the dealers regarding the reason why the price is always the same?

* * *

The Witness: No, I don't believe I have.

Q. (By Mr. Andersen): Have you ever tried to get a higher price for your fish from one dealer than another dealer will pay you?

A. I always try that.

Q. And have you ever had any success?

A. No.

Q. Can you explain any reasons for it? [2899]

* * *

(Testimony of Forrest R. Smith.)

The Court: The form of the question is wrong. Do you have any opinion as to why you get the same price for your fish is the question.

The Witness: Very definitely.

The Court: What is your opinion?

The Witness: My opinion is that the dealers have some method of telling what the other one is paying and they all kind of—my opinion is that they just group together and set the price.

The Court: That is your opinion?

The Witness: Yes.

Mr. Rubin: Now, if your Honor please, we will move to strike that as being self-serving.

The Court: Yes, that is. [2900]

Mr. Andersen: It couldn't be self-serving because, as your Honor has indicated, the dealers aren't a party to this action.

Mr. Rubin: But this witness is a defendant in the case, if your Honor please.

The Court: The motion to strike is denied. It goes to the weight of the testimony. The jury is entitled to receive it and weigh it as an opinion and as an opinion only of the witness, the same as they received all other opinions that have been expressed here from time to time, not only by the fish dealers but by statisticians and experts of one kind or another.

Mr. Rubin: And counsel.

The Court: They will disregard all opinions of counsel.

(Testimony of Forrest R. Smith.)

Q. (By Mr. Andersen): Now with regard to the beginning of a fishing voyage, do you know what price is for the fish that you are going to catch?

Mr. Dixon: If the Court please, I object to the form of the question. This witness can be asked or questioned in a proper form as to what he does, if anything.

The Court: I think so. Objection sustained.

Q. (By Mr. Andersen): Before you go out on a fishing voyage, Mr. Smith, do you endeavor to procure a price for the fish you are about [2901] to catch before you leave on the voyage? Has there been any practice with respect to that?

A. Well, I can explain what I do.

* * *

The Court: That still calls for a yes or no answer. I think the form of the question can be a little bit less [2902] ambiguous.

Before you go out on a fishing voyage do you make any arrangements for the price you are going to get for the fish you catch if you catch any?

The Witness: I try to [2903]

* * *

Q. (By Mr. Andersen): Did you participate in a strike last year? A. Yes.

Q. And before the strike was called were you ever able to procure a definite price for the fish you were about to catch? A. No.

Q. And does your last answer apply to many years of fishing with the exception of the OPA period?

(Testimony of Forrest R. Smith.)

A. The overall picture, yes. There were a few exceptions, but very few.

Q. Do you carry insurance on your boat?

A. No.

Q. Why? A. The cost——

Mr. Rubin: Just a moment, Mr. Smith, please. That is objected to as immaterial.

The Court: Objection sustained.

Q. (By Mr. Andersen): Do you know a man named Di Massa? A. Yes.

Q. Do you remember having a conversation with him? A. When?

Q. On the first day of the strike. A. Yes.

* * *

Q. Were you the captain of the picket line?

A. Yes.

Q. Could you relate the conversation you had with him as you recall it?

A. The ice man, the man that drives the ice truck in San Pedro, that delivers to the markets and myself, went to Mr. Di Massa's market, the L. A. Fish and Oyster, and asked him how much fish he had on hand, how much ice he needed to keep those fish, because we didn't want him to have any loss or spoilage of fish and he could have all the ice he required to keep those fish, and the ice man would deliver it. That was the gist of the conversation.

Q. Did you have any trouble of any kind with Mr. Di Massa? [2905] A. Oh, no.

(Testimony of Forrest R. Smith.)

Q. You got along with him friendly?

A. Very friendly.

Q. Are you friendly with him at the present time? A. Yes.

Q. Do you remember a conversation you had with the witness Castignola? A. Castignola?

* * *

Q. Well, this has to do with a clearance card about Nello Castagnola.

A. Yes, I think I know the boy you mean now. Yes, I did.

Q. Do you recall having a conversation with him?

A. Yes, I believe I did.

Q. This would be on or about June 6th.

A. I am sure now; the boy has the boat called the Flyer. Yes, I had a conversation with him.

Q. At the Union Hall? A. Yes.

Q. What was the conversation as you remember it?

A. On June 6th he come into the Union Hall, I think his brothers were with him, and he requested a clearance card, and the strike committee was there in the room, the union strike committee, and he was told to leave the room and the committee would vote on it. And he did, and the strike committee voted in favor of giving him a clearance card. About five minutes later he had his clearance card and was on his way fishing, as far as I know.

Q. Nothing to stop him from fishing that you knew of? A. No.

(Testimony of Forrest R. Smith.)

Q. Did you get along with him all right?

A. Sure.

Q. Did you have any trouble with him of any kind? [2907]

A. No.

* * *

Q. Do you know a man named Stagnaro?

A. Yes.

* * *

Q. Do you recall having a conversation with him?

A. Yes.

Q. Do you recall the conversation?

A. Yes.

Q. And what was it, in brief?

A. He came to the Union Hall and requested a clearance card, and the same procedure was followed. He was told to leave the room and the Strike Committee voted on it, and he got his clearance card.

Q. There were two other witnesses, Falcone and Bogdonich, do you recall conversations with them?

A. Yes.

* * *

Q. (By Mr. Andersen): Was there any difference with respect to those two men?

A. Not in so far as their request in the Union Hall for a clearance card. [2908]

Q. Did they request clearance cards?

A. Yes.

Q. Were clearance cards granted to them?

A. As far as I know, they were, yes.

(Testimony of Forrest R. Smith.)

Q. With respect to Falcone and Bogdonich, do you know whether they did picket duty or whether their picket duty consisted of repairing their nets at the picket line?

A. I wouldn't know that.

* * *

Q. Do you remember Superintendent Ripley?

A. Yes.

Q. What was your conversation with him?

A. I believe it was the first day of the strike, Mr. Ripley, I believe, is the head of the Railway Express, and he come down there and introduced himself and wanted to know if I was captain of the pickets and I said yes; and he wanted [2909] to know if we would allow the Railway Express trucks through the picket line to deliver fish, the incoming fish, because he said, "I don't want to have it dumped in my lap; I have no way of keeping it. I would appreciate it very much if you would let the trucks go through the picket line."

* * *

A. Let the trucks go through the picket line and deliver the fish. And I said that is perfectly all right. We have no objections.

He said, "Well, can we pick up the fish?"

I said, "I don't think that would be the right thing to do. All we are interested in is not having the fish spoiled. The markets have facilities to take care of the fish and hold them, and we are giving them ice." And that was the gist of that conversation. And after that all the fish that the Railway

(Testimony of Forrest R. Smith.)

Express had in transit—that come to San Pedro, was delivered to the markets, as far as I know.

Q. Did you get along all right with Mr. Ripley?

A. Certainly.

Q. Did you have more than one or just the one conversation?

A. I had a phone conversation with him.

Q. When was the phone conversation?

A. A day or so afterwards.

Q. What was said? [2910]

A. Well, the phone conversation was that Mr. Ripley wanted the union to send him a letter, requested them—well, the letter—I forget what was in the letter now, but, anyway, the letter was to notify the Railway Express Company that there was a strike, and if the union sent that letter to him that would put him in the clear as far as his company was concerned. And the information was transferred over to Mr. Margolis, and he and Mr. Gil Zafran or Jeff Kibre got the letter up and sent it to the Railway Express Company, and I signed it.

Q. Was that the last meeting you had with him?

A. Yes.

Q. Do you remember a conversation with the witness named Gasio?

A. Was he a truck driver?

Q. A truck driver.

A. I believe that is the name of the truck driver that runs the Union Ice truck.

Q. I believe he is the man who said you would dump his fish.

(Testimony of Forrest R. Smith.)

A. That man? I never knew his name at the time.

Q. Do you remember him when he came into court and testified,—did you? A. Yes.

Q. He testified in the record at around page 1554 to [2911] the general effect that you would see that his fish was dumped if he delivered it to another truck after he left there. Do you recall his testimony to that effect? A. Yes.

Q. I say do you recall his testimony saying that?

A. Yes, I recall his testimony.

Q. Did you ever say any words similar to that to him? A. No.

* * *

Q. (By Mr. Andersen): With respect to your fishing, do you ever ice your fish? A. Yes.

Q. You carry the ice in the hold of the boat, do you? A. Yes.

Q. Something like shown in the moving picture?

A. My boat is almost a duplicate of the moving picture boat.

Q. So you carry the ice in the same way?

A. Yes.

Q. Do you put it in with a hose too? Do you?

A. Yes. [2912]

Q. After you carry ice and catch fish, how long can you carry the fish aboard the vessel?

A. That depends on how many fish you catch and how you catch them. That is, in the quantities you catch them. If you catch a large quantity quick, why, you can hold them for four, five days. But

(Testimony of Forrest R. Smith.)

if you catch a small amount for a long time—the most I have ever been able to hold them has been eight days.

Q. When you go out and bring in a good load and just sort of have enough ice to get in,—is that what you do? A. Yes.

Q. You go out to catch as much as you can, and use your ice to the fullest extent, is that correct?

A. That's right.

Q. When you get in, what is the condition of your catch with respect to the time that you are able to keep it after you get in? [2913]

* * *

The Witness: We have to sell it almost immediately when we come in.

* * *

Mr. Andersen: I didn't hear the answer.

The Court: He said he has to sell it immediately because something.

Q. (By Mr. Andersen): Because what?

A. We have used up all our ice.

The Court: You have run out of ice?

The Witness: Run out of ice. And the holds of those boats are so designed that you can't take all the fish out on deck and then put them all in and re-ice them. Your fish would spoil while you were doing it. [2914]

Q. (By Mr. Andersen): Are there storage facilities available to you so that you can store them some place else?

* * *

(Testimony of Forrest R. Smith.)

The Witness: No.

Q. (By Mr. Andersen): Isn't the Ice Union Company available to you? A. Yes.

Q. Why don't you use the Union Ice Company facilities?

Mr. Dixon: Object to that, your Honor.

The Court: Objection sustained.

* * *

Cross-Examination

By Mr. Dixon:

Q. Now, Mr. Smith, I believe you testified that you have been engaged in the commercial fishing since 1935, is that correct, I mean continuously since that date? A. Yes. [2915]

Q. And some time prior thereto except for the interval of time that you mentioned?

A. Yes.

Q. You own your own boat? A. Yes.

Q. And you decide, do you, when you will go out to fish? A. Well, yes, I do.

Q. And you decide where you will go to fish?

A. Yes.

Q. And you decide when you will come back with whatever fish you have caught, if any, from the trip that you go out on, isn't that a fact?

A. Yes.

Q. And nobody tells you then when to go, where to go or when to come back? That is a fact isn't it?

A. Yes.

(Testimony of Forrest R. Smith.)

Q. Now you were the chairman of the strike committee, were you, of Local 36? A. Yes.

Q. And you were on the picket line, were you not, on May 29, 1946? A. Yes.

Q. Do you recall a conversation had on or about May 29 with Mr. Di Massa and the ice man then on the picket line? [2916] A. Yes.

Q. Did you state to Mr. Di Massa at that time that that was to be the final delivery of ice until the strike was settled?

A. I don't believe I did; no.

Q. Did you state anything comparable to those words in discussing the question of future delivery of ice to the dealers at San Pedro?

A. All we told them in that conversation that I can recollect and remember is the fact that they could get the ice they needed so that they would have no spoilage of fish, and I don't think the conversation went beyond that.

Q. You mean whatever fish they then had on hand they could get enough ice from the Union Ice Company to take care of that, is that what you want the jury to understand was the conversation?

A. Yes. [2917]

* * *

Q. I believe you were present, were you not, when a discussion was had with Mr. Castignola about a clearance card? A. Yes.

Q. And also Mr. Stagnaro? A. Yes.

Q. Are either of those two men to your knowledge members of Local 36?

(Testimony of Forrest R. Smith.)

A. I know Mr. Stagnaro isn't. Whether the Castignola boys are or not, I don't know.

Q. Then to the best of your knowledge at least as far as one is concerned he was not a member of Local 36 at that time? A. That is right.

Q. Did you have a conversation with him about getting a clearance card? A. Yes.

Q. And did you have a conversation with him about doing picket duty to get that clearance card?

A. No.

Q. What was the requirement, if any, to get this clearance card? [2918]

A. Well, that was handled by the strike committee as a whole.

Q. Did you refer these two men, Castignola and Stagnaro, to the strike committee to get a card?

A. I was chairman of the strike committee.

Q. Well, then, are you the one that determined whether they got or didn't get a clearance card?

A. No.

The Court: Who else was on the committee?

The Witness: Oh, there was about a dozen other men.

The Court: You mean all met at once or three at a time?

The Witness: No, they were all there at one time. In other words, I had your position. I was running the strike committee. I had no vote. All the rest of them voted, but I didn't. You understand what I mean?

(Testimony of Forrest R. Smith.)

The Court: I understand what you mean.

* * *

Q. (By Mr. Dixon): It is a fact, is it not, Mr. Smith, that in order to get a clearance card a non-member was requested to, and required to, perform a picket duty, is that not a fact?

* * *

A. That was the general policy of the strike committee; yes.

Q. And it is a fact also, is it not, Mr. Smith, that once the picket duty had been performed by non-member and [2920] a clearance card issued so that the fisherman went out to fish, that he was also told where any fish caught could be sold, was he not?

A. I think that they were informed that they could sell their fish any place except the markets that we had picketed. I believe that was the way it was done.

Q. And you were picketing all of the dealers who had not signed this contract, Exhibit 3 that has been referred to before during the trial, were you not?

A. As far as I know anything about the picket line, we were picketing the San Pedro markets.

Q. Now did you have any conversations with Mr. Bogdonich and Mr. Chigi and Mr. Guglielmo about getting clearance cards?

A. I don't remember any of the names after Chigi. I don't know the boys by their names.

(Testimony of Forrest R. Smith.)

Q. Do you know whether those men were members of your Local 36?

A. Oh, I wouldn't know that.

Q. And that was immaterial, I believe, was it, so far as getting a clearance card was concerned?

A. Yes, we just at the outset asked them for their cooperation.

Q. You are acquainted, are you not, with Mr. Ripley?

A. Yes, sir. [2921]

Q. And you had a conversation with him, did you not, at the time the strike first started about trucks of the Railway Express Company crossing the picket line set up by Local 36 against the dealers?

A. Yes.

Q. And the subject of that conversation with Mr. Ripley was to the effect that you did not want their trucks to cross your picket lines, was it not?

A. We asked Mr. Ripley for his cooperation in not sending his trucks across the picket line. He was told we couldn't stop him but we asked him to cooperate with us, and he did very willingly.

Q. You told him you didn't want their trucks to cross your picket line, did you? [2922]

* * *

The Witness: I just previously stated that we asked his cooperation. We told him that we couldn't stop his trucks from going across but we asked his cooperation, his personal cooperation, in not sending these trucks through the picket line, and he willingly cooperated.

(Testimony of Forrest R. Smith.)

Q. (By Mr. Dixon): And did you have any conversation with Mr. Ripley to the effect that you would not permit Railway Express Company to pick up outbound shipments from those shipments at the San Pedro dock?

A. The same thing happened there. We asked him, he said, having the trucks go in why can't we pick up the other shipments going out, and we said we rather you wouldn't, and he said okay.

Q. Were you present at the time the conversation took place between Mr. Gasio and some of the pickets, Mr. Smith? A. Mr. Gasio?

The Court: He was the truck driver on the witness stand there.

The Witness: Oh, yes, I was there. I had the conversation with him.

Q. (By Mr. Dixon): You were the one who had the conversation with Mr. Gasio?

A. Yes.

Q. And at that time was Mr. Gasio at the San Pedro landside of the dealers' place of business, do you recall, with a truck?

A. With a truck, yes.

Q. He had a load of fish, did he, for delivery to one of the dealers at that time?

A. I think so. I didn't actually see the fish, but I think he did. [2924]

* * *

Q. (By Mr. Dixon): Did you have any conversation with Mr. Gasio about delivering that truck load of fish to the dealer at San Pedro?

(Testimony of Forrest R. Smith.)

A. Yes.

Q. What did you say to Mr. Gasio about making the delivery?

A. Mr. Gasio drove his truck up as far as the picket line and got out and wanted to know what the score was. We briefly explained to him we was on strike and had a picket line, and we would like his co-operation in not going through the picket line; that we couldn't stop him if he wanted to go through, but we wouldn't like him to.

He said, "Can I walk through and talk to the market?" And we said, "Certainly, go ahead."

So he was in there for quite some time and he come out and he got in his truck and drove away.

Q. Did you have any conversation with him after he went to the dealer at the wharf about not permitting the delivery of this fish to the dealer's truck outside of the picket line?

A. No, I did not.

Q. Did you have any conversation with him at all when he came out of the fish dealer's office?

A. Not to my memory, I didn't.

Q. That is, you say you don't now recall any conversation with him at all? [2925]

A. No, I am sure I didn't have any conversation with him when he come out. At the time that he come out——

Q. Do you recall telling him that if a transfer was made of the fish from his truck to another truck out on the highway, that he would be followed?

A. I did not.

(Testimony of Forrest R. Smith.)

Q. Did you tell Mr. Gasio that if that transfer took place or was attempted that, quote, "You would have somebody follow up and destroy the fish or knock it off the truck"? A. I did not.

Q. You say you didn't have any conversation of that kind with him, is that a fact? [2926]

* * *

A. No.

* * *

GEORGE IVANKOVICH,

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Margolis:

Q. Mr. Ivankovich, are you connected with the Fishermen's Union? A. I am.

Q. And how long have you been connected with that union? A. Since 1943.

Q. Were you connected with the union prior to 1943? A. No. 1933, I should say.

Q. What position?

A. Secretary of the union.

Q. What local? A. 1933. Local 33.

Q. Local 33 is now the local which has among its members the fishermen on the purse seine vessels, is that right? A. That's right. [2927]

Q. Was there a time when that local had within its members fishermen working on small boats?

A. Yes, there was.

(Testimony of George Ivankovich.)

Q. And when was that?

A. I believe it was '36, '37.

Q. Before that too? A. Around '35.

Q. All right. Have your activities in connection with the union been in San Pedro during the years that you have mentioned? A. Yes.

Q. Have they been confined to San Pedro, or have you dealt with areas outside of San Pedro?

A. They have been confined to San Pedro.

Q. Are you familiar with the situation with regard to the price at which fresh market fish were selling, say back in the years 1934, 1935?

Mr. Dixon: Object to that, your Honor, as being wholly immaterial.

The Court: Objection sustained.

Mr. Margolis: It is preliminary, your Honor.

The Court: I can't see how it could possibly be material. Objection sustained.

Q. (By Mr. Margolis): Are you familiar with the first attempts to negotiate an agreement covering fresh market fish [2928] in the San Pedro area and in other ports in Southern California?

* * *

A. Yes, I am.

The Court: When was the first?

The Witness: Every year since I remember; since 1933 until 1937, '38, '40 and so on.

Q. (By Mr. Margolis): Do you recall particularly the negotiations in 1936 and 1937 with regard to fresh market fish?

Mr. Rubin: Just a moment. Objected to——

The Witness: Yes.

(Testimony of George Ivankovich.)

Mr. Rubin: —as immaterial, and we submit this entire line of questioning is immaterial. He is employed by Local 33, not the defendant in this case, and testifying to matters that are completely without the issues of this indictment.

Mr. Margolis: Local 33 at that time represented the small boats. [2929]

Mr. Rubin: Local 33 at that time had small boats. There is no testimony——

The Court: I remember; I remember. Let me see these documents that you were laying a foundation for or getting ready to.

(The documents referred to were passed to the court.)

The Court: The objection is sustained.

Mr. Margolis: I just want to say this, your Honor: that there has been some evidence with regard to negotiations, and this would just round that out.

The Court: The objection is sustained, counsel.

Mr. Margolis: Very well. That is the only purpose for which we called this witness.

The Court: Is that all?

Mr. Margolis: That is all I am going to ask him under the circumstances, your Honor.

Mr. Dixon: No cross.

The Court: The jury may disregard the remarks of counsel. You have been in court long enough to know that when the judge has ruled, that is the end of it.

Mr. Margolis: I meant, your Honor, that I intended to comply with your Honor's ruling. [2930]

* * *

(The jury was excused and the following proceedings were had in the absence of the jury.)

OFFERS OF PROOF

Mr. Margolis: Shall I proceed with my offer of proof?

The Court: Yes, if you will, please.

(Whereupon an offer of proof was made by Mr. Margolis and ruled upon by the court, which was reported but not transcribed.)

(Also, Defendants' Exhibit CC-1 through CC-9 were marked for identification.) [2931]

* * *

(Reporter's Note: The following proceedings are to be inserted at page 2931 in lieu of the parenthetical note at lines 13 to 17, as follows:)

Mr. Margolis: We offer to prove that if the witness Clifford Kennison had been permitted to answer appropriate questions he would have testified as follows: That in his first year of fishing from 1939 to 1940 his earnings were approximately——

* * *

Mr. Margolis: ——\$700. That since that time he has averaged about \$1500 a year. That the maximum amount that he has earned all together from all sources in any year since that time was slightly under \$2800, of which a little less than \$2400 was

for fishing, and about \$400 from other laboring employment concerning which he testified.

The Court: Casual employment I think he referred to it.

Mr. Margolis: Similarly, if the witness Forrest R. Smith were permitted to answer appropriate questions he would testify as follows: That he has earned, since he started fishing in [2931-a] 1935, from both his share as a working fisherman and his share as the owner of a boat, from a minimum of \$800 to a maximum of about \$5,000; that he has averaged slightly less than \$2500 per year; that in 1946, which was the year in which he had his highest earnings as a fisherman in all of the time he has fished, he earned somewhat less than \$4,000, around \$3800 or so, for his share as a fisherman, and something less than \$1500, about \$1300 or \$1400 from the boat share. That during the year 1946 he spent about eight months fishing, about eight months working at fishing, and he spent about four months working at repairing the boat; that the members of the crew who worked along with him spent perhaps a week or two, not more than two weeks, repairing the boat, but also spent eight months fishing, and that they earned the same amount——

The Court: That is two weeks without compensation?

Mr. Margolis: Working on his boat, that they earned all together——

The Court: I mean for the two weeks they didn't get paid?

Mr. Margolis: They didn't get any extra compensation. That they earned all together the same amount as he earned for his share as a fisherman, to-wit, somewhere in the neighborhood of \$3800. That the \$1300 or \$1400 which was his boat's share was the total compensation which he received [2931-b] for the boat and for all of the work that he did on the boat over a period of approximately four months, and represented at least three and a half months more work than the members of his crew. That if he had taken the boat to a contractor to have the same work done in repairing the boat that he did during the four-month period, that it would have cost him considerably in excess of \$1500 to have that same work done. That if the boat share were credited to his time worked while repairing the boat, his earnings would have been less per day and per week and per month during that period than his earnings for the other eight months per day, per week, and per month working as a fisherman.

Mr. Sawyer, if he would have been permitted to answer appropriate questions, he would have testified that during the time that he owned and operated his boat he never made any money, and that he just about broke even on the boat and received nothing for his labor; that after he sold his boat he went fishing for two and a half months on a share basis on another boat in which he had no interest at all, fishing albacore, and during those two and a half months earned approximately \$600.

I am now going into the Ivankovich offer. Does your Honor want to rule on this first?

The Court: The offer of proof is denied on the grounds indicated in the course of the examination of the witnesses [2931-c] by the objections to the questions by the government relating to the same matters.

Mr. Margolis: I understand that is immateriality?

The Court: Immateriality.

Mr. Margolis: I would like to have those documents marked for identification now.

The Court: Very well. Mark them all with one number and the clerk can arrange them consecutively.

The Clerk: CC, DD——

The Court: No. CC-1, -2, -3, -4, -5, -6 and so on.

The Clerk: CC-1 is the agreement.

The Court: The remainder are letters?

Mr. Margolis: The remainder are letters, and you might read the date.

The Clerk: CC-2 is a letter dated February 15, 1937; CC-3, letter dated February 19, 1937; CC-4, letter dated May 12, 1937; CC-5, minutes of Market Fishermen's Division Meeting, San Pedro, California, Carpenter's Hall, May 23, 1937; CC-6, minutes of Market Fishermen's Division Meeting at Carpenter's Hall, June 4, Sunday, August 31, 1937; CC-7, special meeting, San Pedro Market Fishermen's Division, August 29, 1937; CC-8, minutes of San Pedro Fishermen's Division Meeting, Sunday, September 12, 1937; CC-9 is a letter dated September 17, 1937.

Mr. Margolis: We offer to prove through the witness [2931-d] George Ivankovich, if we were permitted to ask appropriate questions and he were allowed to answer them, the following: That in the years 1934, 1935, and, to some extent in later years, but particularly during those years, fish often sold for so low a price that the fishermen acting through him used to call the charities, and in order to comply with the law and not destroy their fish, rather than sell them at the low price that was offered they gave their fish away to the charities. That this was not an infrequent occurrence, but was something that was quite regular. That in 1936 and '37 there were considerable negotiations in the Los Angeles area with the San Pedro wharfside dealers concerning an agreement for the price of fresh fish. The document CC-1 is an agreement which was proposed locally to the San Pedro dealers, as well as in other ports, and which was entered into in the San Diego area, but the identical agreement was not entered into in the San Pedro area, although negotiations were carried on concerning this agreement which was, as far as the San Pedro area is concerned, a proposal by the union to the market dealers.

That the document CC-2 is a letter which was received by the witness in his capacity as secretary of Deep Sea and Purse Seine Fishermen's Union, which was the name by which the union was known at that time, from the San Pedro Fish Exchange. That the San Pedro Fish Exchange is the same organization which has previously been re-

ferred to in this testimony [2931-e] and in connection with which certain cease and desist orders were entered as previously testified.

That pursuant to the request for negotiations, negotiations actually were carried on, but never did result in an agreement.

That the letter CC-3 dated February 19, 1937, is also a letter which he received from the San Pedro——

The Court: Perhaps you can shorten your offer by simply stating that you offer to prove that all of those documents are what they purport to be, were executed on or about the date they bear, and were made pursuant to what their contents purport to relate?

Mr. Margolis: With regard to the letters, if I could only add that they were in each case mailed to and received by the addressee.

The Court: They purport to be mailed to him.

Mr. Margolis: It doesn't show on the face of the document, but we would show that they were mailed to and received by the addressee in each case.

The Court: In other words, that everything transpired which the relate and purport to have transpired?

Mr. Margolis: That pursuant to the statements made in CC-3 with regard to the appointment of a man to meet with the committee at the market to fix prices to be paid fishermen for their fish and to weigh all boxes and fish on the wharf [2931-f] or in the market as you see fit—I am quoting from the

letter there—that is the end of the quotation, the union did appoint such a man who for a period of several months, four or five months, did act on the pier at first trying to negotiate for the individual catches of the fishermen for the purpose of getting the best possible price for each fisherman; that that practice went on for only several weeks because of the fact that this individual appointed by the union to negotiate in each case was offered uniform prices at any given time or at each different time by all of the dealers, and at no time was able to negotiate any different price with any dealer than the first offer that was made to him at that given time; therefore the negotiation part of the procedure, negotiation for prices, was attempted only for a period of several weeks, two or three weeks, and thereafter was not even attempted, but that for several months the man did remain on the wharf and did participate in the process of weighing the fish as it came in.

With regard to CC-5, they are a set of minutes of May 23, 1937 and show the action that was taken at the meeting at that time.

Similarly with regard to CC-6 and CC-7 and CC-8.

The Court: Very well. The offer of proof is refused on the ground of immateriality and remoteness. [2931-g]

* * *

TRANSCRIPT OF TESTIMONY

(Resumed)

The Court: Just a moment. I want to look at yesterday's transcript.

Mr. Andersen: Page what?

The Court: 2900 and 2901. The question that you were asking the witness Smith to express his opinion as to why he always got the same price for his fish, which I permitted, and denied the motion to strike; I have been wondering if I did not make a mistake in respect to that, not only on the ground that it was self-serving, but because it is immaterial.

Originally I permitted some testimony on cross-examination by the witness Ross, and some of the other witnesses on cross-examination by the defendants as to an alleged or asserted combination for violation of the Federal Trade Commission Act, and it was in that connection, as I recall, that the testimony got into the record. I have indicated since, in sustaining objections to offers of testimony [2934] by the defendants, that it is immaterial whether or not the dealers are or are not in a combine of any kind, or do or do not agree among themselves as to the price they will pay for fish. If that is so, that is not a defense to the action here. So I was inclined to think that I made a mistake.

Do you wish to have recourse to the record?

Mr. Dixon: If it please the court, that was the thought we had in mind in making the objection, that it was immaterial at this time.

The Court: I know that. I got to thinking the matter over in connection with the evidence that went into the record in that respect, and where the government has offered evidence—except preliminarily at the very beginning of the trial as to the nature of the fish business—I have declined it or the government hasn't offered it.

Mr. Rubin: At this time, if your Honor please, we renew our motion to strike the evidence of Mr. Smith in that respect in accordance—pursuant to the matter contained in the record as indicated by your Honor, on the ground that it is immaterial and does not tend to prove or disprove any of the issues in this case. We feel, also, that a ruling at this time will be helpful because it would simply obviate additional objections and re-argument as to possible subsequent witnesses. [2935]

Mr. Andersen: We think that this line of testimony is admissible. We also think that an expansion of that same line of testimony would also be admissible.

The Court: On any other legal grounds than those you have heretofore advanced?

Mr. Andersen: Yes, on all of those grounds heretofore advanced.

The Court: On any others than those you have advanced?

Mr. Andersen: No. I think they have all been covered.

I don't want to argue it at length, but your Honor knows that the defendants here are accused of being businessmen, independent entrepreneurs, or what-

ever term the Government chooses to call them, and part of the testimony that we have adduced goes to refute that very proposition, to show the circumstances under which they operate.

For instance, the Government yesterday asked if they could fish where they chose and when they chose to fish. We propose to show, for instance, that that is a matter that the fishermen haven't anything to say about at all.

Likewise with respect to the sale of fish, we think that we have the right to show that when these men sell their fish, it has already been brought out there is only one place, or one type of place where they can sell the fish. It has already been gone into on the Government's case, that there have been combinations in the past against the fishermen. We [2936] want to show that they really have no opportunity to be these independent businessmen that the Government claims they are.

We want to show that these men are simply working fishermen who come in and dispose of their products, the fruits of their labor at whatever price these people deem fit to pay. They have no choice in the matter at all.

The Court: I think his opinion is the thing that I am speaking of now, and I do not think that that makes his opinion admissible. Even if your testimony is admissible as to what prices they received, that is a different thing than receiving his opinion as to whether there was a combine or not.

Mr. Rubin: Yes. Now that of course is part of the objection. The principal objection, I think the

guts of the matter, is whether or not the evidence at all is admissible. As your Honor has ruled several times, self-defense is no defense.

The Court: I say it is his opinion, and if that is his opinion, his opinion is that, and even if his opinion were true it would not make any difference if they were in a combine.

The Court: I think that I will strike it.

Mr. Rubin: That is correct.

Mr. Kenny: Before your Honor rules, there is one other thing, I suppose, in which the Court can take judicial notice, and that is that the San Pedro Fish Exchange, which has been [2937] testified to, was the defendant in an antitrust action brought by the Antitrust Division and in which the allegation was that part of their conspiracy was to depress artificially the prices paid to fishermen.

The Court: That was in 1939, is that right?

Mr. Kenny: 1942.

Mr. Rubin: 1942. It was a civil action. That is not the FTC order.

Mr. Kenny: This is new matter. I just ran into it.

Mr. Rubin: That is not material to this case at all.

Mr. Kenny: Let me tell the judge about it, please. It took place in Judge Beaumont's court.

Mr. Rubin: We will give them a copy of the decree.

Mr. Kenny: I think that would be helpful. It will save our subpoenaing it. We would like a copy of the decree and the complaint for the record.

That was in 1942 after the FTC. I don't think that that has been brought out, and we do intend to make that an offer of proof, and if the Government will furnish the decree and the complaint that will be most helpful.

Mr. Dixon: We presume that after that order has been entered into that it is not being complied with? Is there a presumption then raised? From our point of view, your Honor, it is wholly immaterial.

The Court: I think it is immaterial. [2938]

As I endeavored to point out heretofore, the most graphic illustration which came to my mind was a murder case. You can use self-defense. But in this kind of a case you cannot use self-defense. It doesn't make any difference what the other fellow tries to do to you.

Mr. Kenny: We can at least use it to impeach the testimony of Mr. Ross, who was a member of the Fish Exchange.

Mr. Rubin: The Fish Exchange is not a party to this case, if your Honor please, and they are not being tried in this case. The question of the Fish Exchange was brought out by the defendants, not by the Government.

Mr. Kenny: The only thing is, the Government brought out this testimony about the eager fish dealers who greeted the returning fishermen at the wharf and did actively bid for their fish. That just isn't so, and the Government itself has said that they combined as recently as 1942 to depress the prices paid to fishermen. It seems to me that that is impeachment of a very high quality.

Mr. Dixon: The purpose of that is to show the buyer-seller relationship, your Honor. Mr. Kenny has completely misconstrued what that evidence shows and the purpose of it.

The Court: That was offered to be limited only to prove that the fish dealers bought fish.

Mr. Dixon: That is right.

Mr. Rubin: From these parties and that they were not [2939] employees. That is the whole purpose of even the allegation.

The Court: I think it is immaterial whether they are a combine or not, and I shall instruct the jury as they come down here this morning to disregard it.

On the other matter, I would like to see a copy of the complaint and the decree so I can fortify myself when the situation does arise.

Mr. Rubin: We would be very happy to supply one.

The Court: Call the jury down.

(The jury returned to the courtroom at 10:15 o'clock a.m.) [2940]

* * *

The Court: Ladies and gentlemen of the jury, yesterday afternoon when the witness Smith was on the stand, Mr. Andersen asked him something concerning his opinion as to why the fish dealers paid the same price. The question as finally formulated was one which I formulated as follows:

“Do you have any opinion as to why you get the same price for your fish?”

“The Witness: Very definitely.

“The Court: What is your opinion?

“The Witness: My opinion is that the dealers have some method of telling what the other one is paying and they all kind of—my opinion is that they just group together and set the price.”

I denied a motion to strike it and stated to you that it was opinion evidence and was to be received in the record as contra, that is, as against the opinions expressed by the fish dealers. On further reflection, I recall that the testimony in that respect, when it was expressed by the fish dealers, was on cross examination, and, moreover, I am now going to grant the government's motion to strike the testimony of Mr. Smith as to what his opinion was, for the reason that it is completely immaterial not only as to what his opinion was, but [2941] if his opinion were true that the dealers were in some kind of a combination, it is immaterial to this case, because as I have indicated to counsel self-defense is not a defense to this type of an accusation by the government.

* * *

GILBERT ZAFRAN

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Margolis:

Q. Mr. Zafran, what is your occupation?

(Testimony of Gilbert Zafran.)

A. At the present time I am the secretary-treasurer of Local 36.

Q. That is of the defendant Local 36?

A. That's right.

Q. And you yourself are, of course, a defendant in this case, is that right? A. That's right.

Q. Have you in the past been a commercial fisherman? [2942] A. I have.

Q. When did you start fishing commercially?

A. I first started fishing in 1925.

Q. Was that for fresh market fish or for cannerly fish? A. Fresh market fish.

Q. I wonder if you would tell us just generally what the nature of your commercial fishing experience participation in that industry has been since you started in 1925.

A. I started fishing in 1925 with my uncle. We fished barracuda and halibut, that is gill net barracuda and halibut for the fresh markets.

Q. How big a boat did you have?

A. A 45-foot boat.

Q. How many men in the crew?

A. Three-man crew. And I think, as I recall, I fished on that boat for about five months. Following that I went into the other end of the business and worked for the fish dealers. I worked for them for a period of six months or so, and then went out of the fishing industry altogether; came back in again in 1929 and fished on a purse seine at that time, fished sardines out of Monterey.

(Testimony of Gilbert Zafran.)

Q. That is a big boat, is that right?

A. That's right.

Q. How big a boat?

A. That was about a 72-foot boat [2943]

Q. Is that the kind of a boat that the members of which are eligible for membership in Local 33 but not in Local 36? A. That's right.

Q. All right. Go ahead.

A. I fished the entire season, I believe I was on that boat for a period of nine months, and left that boat and went small boat fishing again in San Pedro. We fished for market fish at that time exclusively.

Q. How large a boat?

A. That was a 45-foot boat.

Q. Three-man crew?

A. No; it was a little larger crew. There was a four-man crew in that instance. We fished three or four different types of fish, so we needed more people. Fished lobsters and various fresh market fish, used nets and hook and line, we used every type of gear that it was possible to employ. I was on that boat for two or three months, I believe, and then quit fresh market fishing.

Q. Have you resumed fresh market fishing since then or any kind of fishing?

A. Periodically since then, but not exclusively for the fresh market.

Q. What was your next fishing experience?

A. My next fishing experience was in 1936, I believe. [2944] I went back into the purse seine

(Testimony of Gilbert Zafran.)

fleet fishing sardines, and I fished purse seine regularly, or I should say continuously for the sardine seasons, which was about six months of the year is what I actually fished, and went into other line of endeavor for six months of the year and fished six months of the year, up until 1939.

Q. In 1939 what did you do then?

A. I became the business agent for Local 33. That is, the local that is now known as 33.

Q. What was it known as then?

A. I believe it was—no, it was the same deal, it was the same thing as it is now. It was prior to '39 that it was the United Fishermen's Union of the Pacific. But at that time it was the same as it is now.

Q. Have you ever owned a boat? A. No.

* * *

Q. (By Mr. Margolis): Have you ever owned any interest in a boat? A. No, I have not.

Q. Then, I assume when you fished, during all of these periods when you fished, you fished on a share basis on a boat owned by somebody else, is that right? A. That's right. [2945]

Q. How long did you remain business agent for Local 33, purse seine boats?

A. Approximately 14 months.

Q. What did you do after that?

A. Then I went back fishing.

Q. Did you continue fishing until you began your present job?

(Testimony of Gilbert Zafran.)

A. I fished the one season. Following my resignation, should I say, as business agent of Local 33 I fished one season, and then I had to quit fishing because of ulcers, I had them pretty badly so I had to go ashore. I didn't do any more fishing since November of 1942.

Q. When did you become secretary of Local 36?

A. I think it was in June of 1945.

Q. Have you occupied that position continuously since June of 1945? A. I have. [2946]

Q. What are your duties and what have been your duties as secretary of the local? Just state them briefly.

A. Primarily it is to take care of, that is, when I first started out it was to take care of, the San Pedro unit and to build that as much as possible.

Q. What do you mean by build it?

A. Well, get additional membership and take care of the membership that we had there, do whatever was necessary to keep a healthy local going. And it developed from that point into taking care of the other units as they developed.

Q. By the other units, you mean the Newport Beach unit?

A. Newport Beach unit, Santa Monica, and so forth.

Q. What kind of activities, however, were undertaken on behalf of the membership? What have you done?

A. Well, the activities were to negotiate if there was any negotiation to take place, to meet with the

(Testimony of Gilbert Zafran.)

dealers whenever it was required, to do everything that was necessary to keep the organization functioning in a proper manner.

Q. Does Local 36 have an office some place?

A. Well, we had squatter's rights, if you want to put it that way.

Q. What do you mean by squatter's rights?

A. Just that. We don't have an office of our own, but we are allowed the privilege of using the office of Local 33. What I mean by that is that we are in the office of Local 33, [2947] none of the equipment belongs to us, we use whatever we can, and the girls that are there of course do whatever work they can for me when they haven't the work for Local 33 to do, which means that I have to do most of the office work myself.

Q. You are a fulltime paid employee of Local 36, are you? A. That's right.

Q. Does Local 36 have a fulltime-paid office girl? A. No.

Q. Do you have any other fulltime-paid employee?

A. Well, *the* have a full-time-paid employee in Santa Monica and one at San Diego and I believe they have an office girl in Newport.

Q. By the way, about how many small boats are there fishing out of the San Pedro harbor?

A. When you say "small boats" do you mean commercial boats solely?

Q. Yes, small commercial boats.

A. I would say around 450.

(Testimony of Gilbert Zafran.)

Q. Would that include Santa Monica, Redondo, or is that just San Pedro?

A. No, that is just San Pedro.

Q. Was that same situation approximately true in 1946, in June or before June 1946?

A. Yes, it was. [2948]

Q. In other words, the number of boats fishing out of San Pedro has remained approximately the same?

A. I would say so; yes.

Q. Now does Local 36 have its members on all of those boats?

A. No.

Q. On about how many boats of the 450 does Local 36 have members?

A. I would say about 175 out of the 450.

Q. Now as to that 175 boats on which Local 36 has members, are those boats manned entirely by members?

A. Unfortunately they are not.

Q. Are you familiar generally with the size of the crews of these small boats fishing out of San Pedro?

A. I would say yes.

Q. I wonder if you could give us a general picture of how they run.

A. When you say "crew" I don't quite understand you. Do you mean the number of men on so many boats and so on down the line?

Q. That is right. For example—maybe we can do it this way—there are 1-man boats, are there not?

A. Yes.

Q. Those that are operated just by one man?

A. That is right. [2949]

Q. How many of those boats would you say there are?

(Testimony of Gilbert Zafran.)

A. I would say there are 25 one-man boats.

The Court: Do they fish fresh fish exclusively?

The Witness: No, no. It is both. They may fish cannery fish or they may bring fresh fish in.

The Court: The 450 boats do cannery fishing too?

The Witness: That is right.

Q. (By Mr. Margolis): Is that 25 one-man boats on which there are CIO members or 25 one-man boats overall?

A. I would say 25 one-man boats on which there are CIO members.

Q. Do you know how many one-man boats there are overall?

A. You might add an equal number.

Q. You are more familiar, are you, with the size of the boats on which there are union members than you are the overall?

A. Definitely, because I service them more or less, or I go aboard them or I contact them more often. Therefore I would have a little more idea as to those particular boats.

Q. Now there are boats that have two men on them?

A. Yes, there are boats with two men on them.

Q. How many of them are there that have union members?

A. I would say around a hundred, a hundred and five. [2950]

(Testimony of Gilbert Zafran.)

Q. There are also boats with crews of three?

A. Yes.

Q. About how many of those boats are there, that is, where there are union members on the boats?

A. About 25 I would say.

Q. And there are also boats with crews running four and five?

A. Yes.

Q. How many boats with union members on are there in that class?

A. About 20.

Q. What is the total number of union members, that is, Local 36 members, in San Pedro?

A. When you say total number do you mean paid-up members?

Q. Paid-up members.

A. Approximately 200.

Q. Was that the situation also in June of 1946 and prior to June?

A. Pretty much so.

Q. Incidentally, your testimony with regard to the size of the boats, would that apply to 1946, including the month of June?

A. Yes, I am quite sure it would.

* * *

Q. Do you know approximately how many of the 450 small boats that you have referred to engage part of their time in catching market fish and how many of them engage all of their time in catching market fish?

* * *

The Witness: I would say the full time fresh market fishermen who fish fresh market fish the year 'round comprise about 20 boats.

(Testimony of Gilbert Zafran.)

Q. (By Mr. Margolis): About 20 out of 450?

A. Yes. And the boats that fish fresh market fish part of the time through the year I would say about 90 in addition to the 20, 90 additional boats come to the fresh market fish throughout the year, that is, during the year they bring fresh market fish in. So that would make about [2953] 110 boats, I would say, that fish fresh market fish some time during the year out of that 450 boats.

Q. And what do the other 340 or so do?

A. They tie them up.

Q. When they do fish, what do they fish for?

A. They fish for cannery fish.

Q. During your experience as a fresh market fisherman, which you have testified as taking place on and off for varied periods over a number of years, and during your experience as an officer of Local 36, have you become familiar with the general custom, general practice, through which fish are disposed of by fishermen at the San Pedro wharf?

A. I have.

Q. Has there been any substantial change in those customs or practices or methods by which fish have been sold during the period that you have been familiar with customs and practices?

* * *

The Court: Did you hear the testimony of the witness Smith yesterday?

The Witness: Yes, I did.

The Court: As to the custom and method of selling fresh fish, and the practice?

The Witness: Yes.

(Testimony of Gilbert Zafran.)

Q. (By Mr. Margolis): Would your testimony be the same? A. Yes, I would say so.

Q. Now during the period that you have been familiar the practice, that is, during the period when you have been fishing fresh market fish and have been an officer, have you observed any kind of a change in that custom or practice?

Mr. Dixon: Objected to as wholly immaterial, your Honor, and cumulative.

The Court: Overruled.

The Witness: The custom, as far as I know, has been about the same right along.

The Court: I would like to say to the jury that a lot of these questions, including the testimony, that you cannot [2955] run this business with a pair of scissors, you cannot make a straight line, so that is bound to have a little variation. So if in your minds you happen to think that I have admitted something or excluded it, you are to disregard it because that responsibility is mine and you are to pay no significance to it.

Q. (By Mr. Margolis): You were present in the court room when the witness, Mr. Rose, testified, were you? A. I was.

Q. You heard his testimony about the presentation on the 20th day of May to him of a contract, a proposed contract by you? A. I did.

Q. Did you on that date or about that date present a contract to him? A. Yes.

(Testimony of Gilbert Zafran.)

Q. And is that contract the contract which is in evidence as Government's Exhibit 3? Have you seen Government's Exhibit 3?

* * *

A. It appears to be it.

Q. Was anyone else present besides yourself and Mr. Ross at the time of that conversation?

A. Yes, there were.

Q. Who else was present?

A. There was Mr. McKittrick, myself, Mr. King, and I believe there was one other party but I am not positive, but I believe there were four of us. Three of them I am sure of. [2957]

Q. All right. Do you recall what was said at that time?

A. With relation to my conversation with Mr. Ross?

Q. That's right.

A. More or less. That is, the general conversation.

Q. Do you recall the substance of it?

A. Yes.

Q. Will you tell us what was said, indicating who said what?

A. Well, when we handed the contract to Mr. Ross his first exclamation, should I say, with reference to it was that the contract appeared to him to be very good, and he went on down the line reading it, and he said, well, he thought that stabilization would help the entire industry and he was for it. Then he suddenly stopped and said, "We can't fix

(Testimony of Gilbert Zafran.)

prices," because they had been indicted, as I understood it, in the past, and they had a life probation——

Q. Is that what he said?

A. Yes, and they had a life probation hanging over them and couldn't fix prices at any time. But so far as the agreement, aside from prices, itself, that he was in agreement with it, and the only reason he could not sign the agreement was because of this price-fixing they had gone into. And then, of course, we went into the business of explaining the whole thing and going through the various clauses as we understood [2958] them to be, and took in the Fishermen's Act, and we took in all the various decisions as I knew them that existed at that time. We had quite a lengthy discussion, I would say for at least a half hour or so, in threshing the entire matter out. And we covered all the issues that either of us could bring up. However, the conversation ended with that, as far as he was concerned he couldn't possibly sign it at that moment because of this agreement—this indictment that they had hanging over their head, and he wasn't going to take any chances. However, he would submit it to his attorney and he would contact us later with reference to the signing of the agreement. And that is where we left.

* * *

Q. (By Mr. Margolis): Do you recall having a subsequent conversation with Mr. Ross a day or two before the strike went into effect?

(Testimony of Gilbert Zafran.)

A. With Mr. Ross personally or with a committee that Mr. Ross was part of?

Q. With Mr. Ross personally.

A. Yes, there was a conversation between myself and Mr. Ross in which he asked that a meeting between the union and the fish dealers——

* * *

A. (Continuing)——take place as soon as possible in order that we may be able to work out whatever disagreement there may have been in relation to the contract, and so forth, so that we can get this thing straightened out and go fishing.

The Court: When was this with relation to the time you left him the contract?

The Witness: This was shortly after that day. Possibly two or three days following that time.

The Court: And with relation to the establishment of the picket line?

The Witness: Well, that was before the establishment of [2961] the picket line.

The Court: All right.

Q. (By Mr. Margolis): Before we get on to that, there is something else I want to direct your attention to. At page 167 of the transcript, Mr. Ross testified that in a conversation with him you stated to him that no fish would be permitted to come in on the seaward side or on the land side after Saturday, June 1st. Do you recall that testimony?

A. I recall the testimony vaguely, yes.

(Testimony of Gilbert Zafran.)

Q. Did you ever have any conversation with Mr. Ross in which the question of fish coming in on the seaward side or on the land side after Saturday, June 1st was the subject?

* * *

A. Yes, I had.

* * *

Q. Was it shortly before the strike?

A. Yes, I would say so.

Q. In the course of that conversation did you make the statement which Mr. Ross ascribed to you?

A. No, I didn't make any such statement as that.

Q. Will you state what you did say?

A. What I did say was that we wanted the agreement put [2962] into effect and felt that it was a just agreement, we felt that it would be satisfactory to all, and I couldn't see any reason of hesistancy on their part, and as far as we were concerned that we were going to do everything we could in order to try to get the agreement put into effect, and if they didn't sign or refused to sign, that ultimately we would—well, how would I say it? We would advertise the fact that——

The Court: Is that what you told him? Not how you would say it now.

Q. (By Mr. Margolis): Did you tell him that?

A. I don't know whether I used that particular term, or whether I said we would picket. But we would advertise the fact that we did not have an

(Testimony of Gilbert Zafran.)

agreement, and that we wanted one. I never said at any time to Mr. Ross that we wouldn't permit any fish to come in on the sides.

* * *

Q. (By Mr. Margolis): Before we went into this subject you had mentioned a conversation with Mr. Ross in which he asked for a meeting between the union and the dealers. When he made that request did you make any response?

A. Yes, I said we would meet with him just as quickly as they wanted, and I believe that a date following our conversation was set. [2964]

Q. A date was agreed upon?

A. Yes, I think we met the following day, as I recall.

Q. Do you recall what day it was that you met?

A. I don't recall the day; however, it was between the 20th and the 29th. It was in there somewhere, possibly three days or four days after the time that we gave out or handed the agreement to Mr. Ross, three or four days following that.

Q. Could it have been May 27th?

A. No, it wasn't May 27th, because we had a meeting prior to that date.

Q. A meeting prior to the meeting of May 27th?

A. Yes.

Q. Where was this meeting held?

A. That was held in the loft of Mr. Ross' place of business. That is, we didn't go into the office; we just went up into the upper loft and we sat around on boxes there and discussed the matter at that time.

(Testimony of Gilbert Zafran.)

Q. His place of business on the wharf, is that right? A. Yes.

Q. Who was present at that time?

A. As I remember there was four or five of us there. I believe Knowlton was there, and I don't know whether Smitty was, however I think he was. Anyhow, there were four or five of the fishermen, including myself, that were present at that meeting.

Q. Who were present of the dealers?

A. On the dealer's side, there was four or five or six of the dealers who were there at that time also. I remember definitely Ross being there, and I can't recall definitely who the others were, but he was the spokesman, that is why I can recall his being there very definitely. However, there were four or five others of the dealers there at that time.

Q. Will you tell us what was said and by whom?

A. Well, the agreement, of course, was the thing that was discussed, and we wanted to know what objection, if any, they may have had with relation to the agreement, and they said they felt they couldn't sign the agreement because of the price situation. They went into that phase of it. And everybody took turns of speaking at one time or another. I think we all chimed in, and the general discussion as to the signing of the agreement went along. As I say, we pointed out the various Acts that we thought were a protection for the fishermen, and they were put into effect because of the situation which existed in the fishing industry, and allowed the fishermen to form an association for

(Testimony of Gilbert Zafran.)

the purpose of bargaining with the dealers, and so forth. It was the same thing over and over again. We hit everything that we could think of trying to work out a satisfactory agreement. But the whole thing that stood in the way was—— [2966]

* * *

Q. (By Mr. Margolis): Tell us what was said.

A. They said that the reason they could not sign the agreement was because they had formed a combine before, and that they were indicted, and that in view of that they couldn't sign this agreement because it was more or less along the same lines. And that is why I say that that was what stood in the way.

Q. Did you have any reply to make to their statement that this agreement which you proposed was more or less along the same lines as the one on which they were indicted?

A. That was the emphatic part of it. We emphatically stated that it had no relation at all with the agreement that they had before; that the combine which they had was among the dealers themselves for the purpose that was altogether different from the agreement which we were proposing. The agreement which we were proposing was one of fishermen getting together to try to set minimum prices with the dealers; whereas in the previous situation that they had been indicted on was where the dealers got together themselves for the purpose of buying fish at a definite price set by them from the fishermen, and a definite price at which they

(Testimony of Gilbert Zafran.)

were selling to the [2967] other people that they sold to, and that is why they were indicted, and that the agreement which we were proposing was definitely different from that arrangement, and we couldn't see any relation between the two, therefore we felt that the agreement we were proposing was proper.

Q. Now what was the conclusion of that meeting? What was the last thing that was said or done at that meeting?

A. The last thing that was said was in view of the fact that none of us present were attorneys and we didn't have a command of the law as we should have, that we would have an agreement shortly following that time with representatives——

Q. An agreement or a meeting?

A. A meeting, we would have a meeting of the two groups with the attorneys present from both sides, and we would further discuss the matter. And that is when the meeting broke up and they were going to contact us just when the meeting could be held.

Q. Was a meeting subsequently held?

A. Yes, there was.

Q. When?

A. That meeting took place on the 27th.

Q. Of May? A. Of May; yes.

Q. Where did that meeting take place?

A. That meeting took place in our office, the union office.

Q. Who was present?

(Testimony of Gilbert Zafran.)

A. Oh, there was Mr. Margolis and myself, were present, and there were three or four other fishermen, and I believe [2969] there were about four or five dealers that came from their side.

Q. Do you remember who any of them were?

A. I think that Mr. Di Massa was present and Mr. Vitalich was present because both of them spoke—well, they led the conversation, Vitalich led the conversation and Di Massa chimed in quite a bit. However, I am not positive of the other two or three. I do think that John Solento was there.

Q. How about Mr. Ross?

A. I can't recall whether Mr. Ross was there or not. However, I think he was. But in view of the fact that Vitalich took the lead and Di Massa chimed in, I can recall those two definitely, but the others are vague in my mind.

Q. Will you tell us what was said by the persons present at that conference?

A. Well, we wanted to find out, that is, I asked Mr. Vitalich why their attorney wasn't present, and I don't recall just the extent of the conversation, but I gathered that for some reason he couldn't be there. However, we were going to go ahead and try to work out the contract, or the arrangement, because of the fact that we did have some legal talent there that might be able to throw some light on the questions which were in doubt thus far. And we went through the same procedure. It was the same old rigamarole except that Mr. Margolis brought out the legal points which stood in the way,

(Testimony of Gilbert Zafran.)

and he [2970] enumerated the various rulings that have been made in any case where the fishermen were involved with the dealers, and of course he was a lot more versed on it than I had been. [2971]

* * *

Q. Had you finished your answer, Mr. Zafran?

A. I just simply wanted to say that Mr. Margolis was better versed on it than I and he brought out all these points a lot clearer than had been in the meetings prior to the one that we were at at that time, and that we brought out all these various points, and still the dealers had the same objection, that they couldn't sign the price-fixing agreement simply because they had an indictment hanging over their heads, and we went on and on about these various laws, and so forth, that were in existence for the behalf of the fishermen, and it wound up with the same deal of no matter how much ground we covered or what we tried to do the dealers said they couldn't sign because they had been indicted before.

Well, that is what was said at that meeting.

Q. Following that meeting on May 27th did you send to the dealers this letter which is in evidence as Government's Exhibit 5?

A. Yes, I did. [2972]

* * *

Q. Directing your attention to the second paragraph, "The purpose of this decision was to expediate matters and get a decision from the Government agencies in reference to the legality of sign-

(Testimony of Gilbert Zafran.)

ing a minimum price agreement," I will ask you whether reading that paragraph refreshes your recollection as to any other matters which were discussed at the May 27th meeting immediately preceding the sending of that letter, Government's Exhibit 5.

A. Yes, it does very definitely.

Q. Will you tell us what it was? [2973]

* * *

The Witness: They said that they had contacted the Government for the purpose of getting a ruling on the legality of the agreement and in view of the fact that the Government was slow moving on these issues that they felt that if we went ahead with the program as we had outlined it, or as we had indicated that we would strike if we didn't get an agreement, that that would more or less hurry the Government agencies into giving us an opinion and that possibly that would bring about a quicker settlement of the whole deal.

Mr. Dixon: Now, if the Court please—is the answer concluded?

The Witness: I was just going to say that that is the [2974] reason that this was sent as it was.

Mr. Dixon: I ask at this time that the jury be instructed that the Government is not authorized to give any private citizen any legal opinion concerning any contract, that the only opinions that the Government or its Attorney General or its representatives can give to any person is a governmental official in an official capacity.

(Testimony of Gilbert Zafran.)

Mr. Margolis: If your Honor please, we assign that as misconduct, and we would like an opportunity, if that is the Government's claim, to put on evidence that the Government does not follow that practice but does give opinions, and particularly in the fishing industry it has given opinions in relation to this very subject matter under discussion.

* * *

The Court: I will deny the motion. If there is any objectionable ground it would seem to me that it is immaterial, but even on that basis I think it is admissible. This is a discussion between these people and the dealers. The dealers. [2975] are not the prosecutors here and at the appropriate time I will and intend to give the jury an instruction that in the prosecution of offenses, if the evidence develops that other people are or have been guilty of the same or similar offenses, that it is no defense to the people who are charged here or on trial at the particular time. [2976]

* * *

Q. (By Mr. Margolis): I believe we had finished the meeting of May the 27th, 1946, Mr. Zafran. Was there a subsequent meeting at which you were present between representatives of the union and the dealers? A. Yes, there was.

* * *

Q. (By Mr. Margolis): Do you recall the date when that next meeting was held?

A. I believe it was June 7th.

(Testimony of Gilbert Zafran.)

Q. Where was that meeting? [2977]

A. That was held in the office of Mr. Ross.

Q. Upstairs?

A. Yes, on the waterfront upstairs above his place of business.

Q. Do you recall who was present at that meeting?

A. Well, there was Mr. Ekdale, Mr. Ross, Vitalich—I can't recall who the other dealers were, but there were four or five dealers there; and Mr. Margolis, myself, and three or four other fishermen were there at that time. [2978]

* * *

Q. (By Mr. Margolis): The question was, so that we don't have to go back, what was said by the various persons at this meeting of June 7th held in Mr. Ross' office.

A. Well, the bulk of the conversation was carried on between Mr. Ekdale and Mr. Margolis in relation to the agreement which was being proposed.

Then, as I stated before, all these issues were covered very definitely, the thing was thrashed out and beat around so much there wasn't anything that was not discussed except at this meeting there was brought out the letter which had been sent to the——

Mr. Rubin: Now, just a moment, if your Honor please. If it is going to be a letter that has been rejected in this case we submit that that should be a matter of offer of proof and not gotten to this jury.

(Testimony of Gilbert Zafran.)

Mr. Margolis: It is a question of what was said there.

The Court: This relates to the letter which I refused to admit in evidence, does it, counsel?

Mr. Margolis: I believe it does, your Honor, but the Government has made certain statements about its practices, and this is part of the conversation that took place.

We are not offering these conversations, your Honor, to prove the truth of any of the statements, we are merely offering to prove what was said or done. On this business of [2981] self-serving, what is done during the course of this sort of a series of acts is generally talking. That is generally what is done.

The Court: What is done is what is said. I will overrule the objection.

Mr. Rubin: May I be heard for one moment?

If your Honor please, the technique of getting this letter through a conversation was precisely the same technique that was used at the time your Honor rejected it.

The Court: On cross-examination.

Mr. Rubin: On cross-examination, and this is their direct case. This isn't our case. We haven't opened up the subject. We have excluded it because we felt it was immaterial, and your Honor has not ruled.

Mr. Margolis: We weren't allowed to go into this meeting on cross because the meeting had not been opened up by the Government.

(Testimony of Gilbert Zafran.)

Mr. Rubin: Precisely, and this is their defense and they are trying to meet some evidence that we haven't put in.

Mr. Margolis: The question is, if there are a series of meetings and the Government proves two or three, can we prove the rest?

The Court: No, that isn't the question at all. The objection will be overruled, and if it is immaterial I will strike it. [2982]

Go ahead. You said except that somebody said something about a letter.

The Witness: It wasn't just something said, there was a great deal of discussion which was had in relation to this. That is why I recall it now. In fact, it had been discussed in the previous meeting, May 27th, but at this time there was a great deal of discussion in relation to the letter which was sent by Assistant Attorney General Berge to the dealers, I believe, in the Alaska case where the operators or the dealers and the fishermen——

Mr. Rubin: Just a moment. The letter is marked for identification. It speaks for itself. We submit it wasn't sent to the dealers in Alaska at all. It has been offered and rejected as immaterial.

The Court: I remember reading that letter. There has been considerable dispute and discussion about it, and the letter is immaterial and the witness' statement concerning the letter is immaterial, and what was said there concerning the letter is immaterial.

(Testimony of Gilbert Zafraan.)

Q. (By Mr. Margolis): Let me ask you this: Was this letter exhibited to any of the parties at this meeting? A. I believe it was.

The Court: It is still immaterial.

Mr. Margolis: I would like to again lay my foundation [2983] for my offer of proof, your Honor.

Mr. Rubin: We submit that such an offer should be made out of the presence of the jury.

Mr. Margolis: I am just going to offer the letter. I am not going to tell the jury what is in the letter.

Mr. Rubin: We will stipulate to the foundation, your Honor please, as to the authenticity of the letter.

Mr. Margolis: That isn't the foundation I want.

Q. Was this letter, which is marked Defendants' Exhibit D for identification, the letter which was exhibited to the parties at this meeting of June 7, 1946? A. I believe it was.

Q. And is this the letter that was discussed?

A. Yes.

Q. What was said about this letter?

Mr. Rubin: Now, if your Honor please, same objection.

The Court: Same ruling. It is immaterial.

Mr. Margolis: We would like to renew our offer for the record, your Honor, of Defendants' Exhibit D for identification, and particularly in view of the statement made by Mr. Dixon that the Government never gives advisory opinions.

(Testimony of Gilbert Zafran.)

Mr. Dixon: If the Court please, I rise to ask that the jury be instructed to disregard the last comment of counsel with reference to my remarks.

Mr. Margolis: Mr. Dixon made the remarks in the presence [2984] of the jury. He said the Government never gives advisory opinions. It works both ways.

Mr. Dixon: I understood your Honor did not grant my request.

The Court: I did not grant your request. The jury are instructed to disregard Mr. Dixon's remarks previously made to the jury and Mr. Margolis' remarks, all relating to the subject matter of whether the Government does or does not advise anybody.

I endeavored to straighten the matter out in what I thought would be sufficient in the minds of the jury by stating to them that if anybody is or is not guilty of an offense, or if any evidence points to it or indicates it, that that cannot be used as defensive matter to the charge of a crime because, as I indicated before, this is not like a murder case where you can use self-defense.

Mr. Rubin: If the Court please, for the purpose of the record we will object to the introduction of Exhibit D. I do not believe there is an objection in the record. We object on the ground that it is immaterial.

Mr. Kenny: I don't think this is offered in self-defense. This might be offered on the theory that the District Attorney has provided a weapon to the murderer.

(Testimony of Gilbert Zafran.)

Mr. Dixon: Now, if the Court please, I rise again. I think we have gone into this matter several times before. [2985]

The Court: Yes, I think we have.

Mr. Dixon: And your Honor has ruled it immaterial.

The Court: And it is still immaterial. The objection is sustained.

Q. (By Mr. Margolis): Now, omitting anything with reference to this letter in that conversation, the discussion on the subject of the letter, Defendants' Exhibit D, omitting that entirely, is there anything further that was said at that meeting which you have not yet testified to?

A. Well, except to say that we have gone into all phases of everything that was possible and the attorneys, of course occasionally myself and some of the fishermen, as well as the dealers, would take up some parts of the conversation, and there was a thorough discussion had in relation to all the aspects concerning the agreement and themselves or the indictment which they had had, and the whole picture was thrashed out very, very definitely.

Q. Now were you present at a meeting in Mr. Ross' office on June 10, 1946?

Mr. Rubin: May this be subject to the same objection and same motion to strike, if your Honor please?

The Court: Yes.

(Testimony of Gilbert Zafran.)

Q. (By Mr. Margolis): At which Mr. Kibre and several other fishermen were [2986] present?

A. Yes.

Q. And Mr. Ekdale, Mr. Ross, Mr. Vitalich and other dealers were there, is that right?

A. Yes, they were.

Q. Now for the purpose of trying to shorten this—this may be technically incorrect, so I will rephrase my question, but I just want to shorten it—did you hear Mr. Kibre's testimony with regard to what occurred? A. Yes, I did.

Q. At this meeting of June 10th? A. Yes.

Q. If I were to ask you the same questions with regard to what was said and done at that meeting of June 10, 1946, would your testimony be substantially the same? A. Yes.

Q. Were you also present at a meeting of June 11, the next day, in Mr. Ekdale's office in San Pedro at which were present, in addition, Mr. Ross, Mr. Ekdale, Mr. Margolis, Mr. Kibre, and perhaps one or two others? A. Yes, I was.

Q. And were you present in the courtroom when Mr. Kibre testified about what happened at that meeting, the conversation, the dictation of the letters, and so forth? A. I did. [2987]

Q. If you were asked the same questions as Mr. Kibre was asked about what was said and what was done at that meeting would your testimony be substantially the same? A. It would. [2988]

Q. Did you present a contract similar to Government's Exhibit 3, which you identified this morning, to Mr. Vitalich? A. Yes.

(Testimony of Gilbert Zafran.)

Q. And was that on the same day that the contract was presented to Mr. Ross?

A. Yes, it was.

Q. Who was present? The same people as in the case of Mr. Ross, except that Mr. Vitalich was there instead of Mr. Ross? A. That's right.

Q. Do you recall what the conversation was at that time?

A. Yes. The conversation was along the same lines as carried on with Mr. Ross, for the exception that we didn't go into the matter as extensively as we had with Mr. Ross. However, we talked there about 10 minutes regarding the contract and the various phases of it, and so forth. And it was more or less the same procedure followed.

Q. Did the conversation last more than just a minute or two?

A. I would say between five and ten minutes, anyway. There was more than one or two words said.

Q. Do you recall the testimony of Mr. Hamilton in this court room—— [2989]

* * *

A. Yes, sir.

Q. ——to the effect that he had certain conversations with you concerning joining the union in 1946? Did you have such conversations with Mr. Hamilton?

A. I talked to Mr. Hamilton with relation to joining the union on three or four occasions.

Q. All right. When was the first time?

(Testimony of Gilbert Zafran.)

A. I don't recall just when the first time was, but I would say that it was in the early part of 1946 when I went aboard the boat that he was fishing on with Mr. Tufts and a couple of other boys, and we discussed the matter of joining the union very thoroughly. We went into all phases of it. I tried to explain the benefits of an organization, and so forth. And on the other occasions that I had occasion to talk with him along those lines, more or less the same pattern was followed, trying to show the benefit of the union and how we should all hang together, and so forth and so on. It was just a matter of trying to sell him the idea of the benefits of an organization such as ours.

Q. Did he join the union the first time you talked to him? A. No, he did not.

Q. Did he at any time join the union?

A. Yes, he did.

Q. When did he join and will you state the circumstances, [2990] if you know?

A. He joined the union during the period of the strike. However, no one, that is, not myself or anyone that I knew of, confronted him with joining the organization during that time or shortly prior to that. The circumstances under which he came to join the organization was, as I understood it, that he and Mr. Tufts and all his crew came to the office and said, "We want to join the organization." So in view of the fact that we had contacted all of them before, we certainly weren't going to say no at this time. And they joined the union.

(Testimony of Gilbert Zafran.)

Q. Did you contact them about joining the union during the strike?

A. No, sir, I did not.

Q. Did you at any time tell Mr. Hamilton that he would have to join the union in order to go fishing?

A. I never said any such a thing, because the facts speak for themselves. He was fishing after I talked to him three or four times about joining the union.

Q. Did you during the strike tell him that he had to join the union?

* * *

The Witness: No.

Q. (By Mr. Margolis): Did you ever tell that to anybody? A. No. [2991]

Q. Did Mr. Hamilton fish during the strike at a time when he was not a member of the union?

A. I can't say whether he did or not at that time, because it was shortly after the strike had been under way that they did come in and join. Whether he fished prior to that time I can't say.

Q. Mr. Zafran, Government's Exhibit 27 in evidence is a letter dated May 18, 1946 addressed to George Castagnola Fish Company, Santa Barbara, California, purporting to bear your signature. That is your signature, isn't it? A. Yes.

* * *

Q. (By Mr. Margolis): I want to direct your attention particularly to one sentence of that letter: "The fishermen are determined that prewar condi-

(Testimony of Gilbert Zafran.)

tions will not return and insist upon a stabilization agreement for all of Southern California." What prewar conditions did you have reference to in that letter?

Mr. Rubin: If your Honor please, that is objected to as varying the terms of a written instrument. The document speaks for itself, and we submit this witness is not entitled to explain away these writings. They are admissions against [2992] interest.

The Court: The objection is sustained.

Mr. Margolis: We don't want to explain them away.

The Court: The objection is sustained.

Mr. Margolis: I ask that the jury be instructed to disregard Mr. Rubin's statement that we want to explain away these writings.

Mr. Rubin: It is part of my argument as the basis of the objection.

The Court: Well, you should not argue in the presence of the jury. The objection is sustained, and whatever reason the defendant had to offer is not admissible, and the reason the objection is sustained is because it is a self-serving declaration, it is made to vary the terms of a written agreement, and that portion of Mr. Rubin's objection is good and the rest of it will be disregarded by the jury.

Mr. Margolis: Your Honor, I will submit that the testimony we will offer will not vary this document in the slightest. We stand upon the document.

Mr. Rubin: Then it is immaterial.

(Testimony of Gilbert Zafran.)

The Court: The objection is sustained, and the statement of Mr. Margolis will be disregarded. The evidence is not admissible either from the witness or by statement of counsel.

Mr. Margolis: If your Honor please, with respect to Government's Exhibit 205, which are the minutes of the Joint [2993] Executive Meeting, dated May 25, 1946, the last two paragraphs thereof, which were——

The Court: Excluded?

Mr. Margolis: ——excluded by the offer of the government we would like to offer.

(The document was passed to the court.)

The Court: It may be admitted.

The Clerk: That will be DD.

(The portion of the document referred to was received in evidence and marked Defendants' DD.)

Mr. Margolis: Ladies and gentlemen of the jury, the two paragraphs which have just admitted as Defendants' Exhibit DD, which is a part of Government's Exhibit 205, reads:

“Moved, seconded and carried that we notify our International Office of the condition here and request their financial, moral and economic support.

“Moved, seconded and carried that we request the various CIO state and local councils asking their financial, moral and economic support.”

(Testimony of Gilbert Zafran.)

Q. I will ask you, Mr. Zafran, whether the action that was carried at that meeting was followed through.

Mr. Dixon: We object to it as being wholly immaterial, your Honor.

The Court: I cannot see the materiality of it, counsel. The objection is sustained. [2995]

* * *

Q. (By Mr. Margolis): I want to direct your attention, Mr. Zafran, to the strike committee meeting minutes of May 30, 1946. You were present at that meeting, were you not?

A. I believe I was; yes.

Q. Now that meeting refers to—well, the following appears there—"The attached list of boats will be contacted. Publicity and registration committee to send them a letter to help in the strike. If they do not comply action is to be taken against them. This matter is to be attended to immediately." Was there any discussion at that meeting as to what

A. The only action to be taken that was discussed would be that after these boats had been contacted a number of times and they definitely indicated their unwillingness to aid in the difficulty, that we would put them on the unfair list.

Q. Was an unfair list ever made up?

A. Well, a list was made up. It had been made up quite some time later than May 30th though.

Q. What action, if any, was taken by the union or by yourself or by any other defendants, as far

(Testimony of Gilbert Zafran.)

as you know, with respect to these boats whose names were put on the unfair list or with respect to the fishermen working on said boats?

A. No action was taken. [2996]

Q. It was simply put on an unfair list, is that right?

A. That is right. [2997]

* * *

Q. Mr. Zafran, I would like to direct your attention to Government's Exhibit 201, which is the minutes of the barracuda conference of April 18, 1946. In the minutes there appear certain reports with regard to prices being paid. "Brother Black, Redondo Beach, could get 12 cents if it wasn't for ceiling price. Ceiling price being paid. Gilbert Zafran, San Pedro, ceiling price being paid." That is you made that report, is that right? "Brother Bruce, Newport Beach, same condition, not enough fish coming in to change condition. San Diego, ceiling price being paid off and on. Unstable price condition." Do you recall those reports being made at that barracuda conference?

A. More or less.

Q. Do you recall what period of time was covered by [2998] those reports?

A. A very short period.

Q. What do you mean "very short period"?

A. Well, what was asked is what were the various prices in the various locals, and as each party in that particular port made a report he said the price that was being paid, and certainly we don't

(Testimony of Gilbert Zafran.)

go very far back. It was just that it was the current price, and the current price was the price that was being discussed.

Q. I see.

A. I wouldn't go back more than a week or two at the most.

The Court: By the way, counsel, I don't know whether you will need it in connection with the examination of this witness, but I thought before he got off the stand I should rule, in order that you could guide your examination. As to Exhibit K, the objection is sustained. It is not admitted.

Mr. Margolis: We would like to have that stand as an offer of proof, your Honor.

The Court: Very well. The offer of proof will be denied.

Mr. Margolis: Now, your Honor, with regard to Government's Exhibit 202, we would like to offer the balance of that exhibit which was excluded by the government,s offer.

(The document was passed to the court.)

* * *

The Court: Very well. The objection is overruled. The matter is admitted in evidence.

The Clerk: That will be EE.

(The portion of the document referred to was received in evidence and marked Defendants' Exhibit EE.) [3000]

Mr. Margolis: Ladies and gentlemen of the jury, this is a letter dated April 25, 1946, addressed

(Testimony of Gilbert Zafran.)

“Dear Member” and bearing the signature of Gilbert Zafran, secretary and treasurer.

It refers to the barracuda conference of April 18, 1946 and because other portions of the letter have already been read to you I will only read the portions which are now in evidence.

* * *

Mr. Margolis: Ladies and gentlemen of the jury, I am doing this only to save time. The entire letter will be available to you because it is all in evidence now.

(At this point counsel read Defendants' Exhibit DD to the jury.)

Q. (By Mr. Margolis): Now, Mr. Zafran, you were here in the courtroom when Mr. Kibre testified concerning a number of conferences that market dealers had concerning the question of a marketing [3001] program, some of which meetings were attended by representatives of the Fish and Wildlife Service and particularly by Mr. Ralph Russell?

A. I was.

Q. And you heard his testimony with regard to those meetings?

A. I did.

Q. If you were to be asked the same questions as he was asked with regard to those meetings, would your testimony be the same?

A. Yes.

Q. I will also ask you if this paragraph, in which you state, “Towards this end we have had two meetings with the local and Washington representatives of the Fish and Wildlife Service,”

(Testimony of Gilbert Zafran.)

etc., referring to Mr. Ralph Russell, is that a reference to those meetings to which Mr. Kibre has testified?

A. Yes, there was a Ralph Russell and Harry Hinkle of the local office here.

Q. Of the local office of the Fish and Wildlife Service? A. Yes.

Q. You were appointed, were you not, as a member of some sort of a committee in connection with those meetings? A. I was.

Q. What was that committee? [3002]

A. It was a committee set up for the purpose of trying to work out a program of unifying the industry for a marketing program, and Mr. Ralph Russell was there for the purpose of lending aid in whatever manner he could because he carried on these advertising programs or marketing programs in the East in the past and he had a whole scrapbook of all the various advertisements that had been presented in these different cities, which was helpful to the committee and we were about to inaugurate that particular type of program in this area.

Q. Did the committee to which you were appointed have any meetings?

A. The meeting at which the committee was appointed for the purpose of carrying this program out was the last meeting that was held. At that time they appointed members on that committee, and I was appointed or at least elected as a member of that committee. However, the committee after being set up did not meet.

(Testimony of Gilbert Zafran.)

Q. Do you know what happened in connection with that program?

A. Just one of those things. There was no participation by all parties concerned and it just folded up.

Q. Now, Mr. Zafran, I direct your attention to Government's Exhibit 211, which is the minutes of the strike committee meeting of June 1, 1946, and particularly to that [3003] portion of that exhibit referring to the publicity committee and stating "The committee has not known what has been released to papers. Insufficient things to release." Now I want you to state, first of all, what the functions were—I will withdraw that.

Was there a publicity committee which functioned throughout the month of June 1946?

A. Yes, there was. [3004]

Q. All right. And what were the functions of this publicity committee?

A. The functions of the publicity committee were to acquaint the press with whatever was taking place in relation to the dispute.

Q. By "whatever was taking place," You mean the demands of the union, and so forth?

A. The demands of the union or the position of the dealers, and what progress was made with the various meetings of the dealers, and keep the press acquainted with the situation as a whole. We had nothing to hide, and we wanted to let the people know what was going on. That was the purpose of the publicity committee.

(Testimony of Gilbert Zafran.)

Q. (By Mr. Margolis): You are familiar with the clearance cards procedure that was used in San Pedro?

A. I am.

Q. Tell us what that procedure consisted of, what were the steps that were taken.

A. The steps concerning the clearance cards was very simple: it was simply that the clearance card was issued for the purpose of indicating that that member had complied with the policy of the organization. And the union set down a certain policy for its members, and the clearance card was merely to indicate that he had followed out that particular policy.

Q. Was that issued just to members, or was it also [3006] issued to non-members?

A. It was not restricted to anyone, except that anyone who wished to follow the policy of the organization was given the same type of indication that he had done so.

Q. What was the procedure in obtaining and issuing these cards?

A. The procedure in obtaining one was simply to come into the union and ask that he wished a clearance. A clearance was given to him, and if he stood picket duty, or whatever the case might be, that card was punched to simply indicate the amount of times that he had stood picket duty, or whatever else had been the case.

Q. If a man was given a clearance card in San Pedro, was the clearance card used in other ports? And if so, for what purpose?

(Testimony of Gilbert Zafran.)

A. It wasn't used in other port except to indicate if someone should ask him—for instance, if he went fishing out of Newport or San Diego, or anywhere else for that matter, if he happened to be asked if he had a clearance card, he would show it. In Newport they wanted to know whether or not he had a clearance card as to whether he had complied with the policy of the organization in San Pedro, and he would just simply show it. Aside from that there was no other use.

Q. Do you know if boats went fishing without clearance cards? [3007]

* * *

The Witness: Yes, I know.

Q. (By Mr. Margolis): Did boats go fishing?

* * *

The Court: Objection overruled.

A. They did.

Q. (By Mr. Margolis): Was any action taken by the union against any of those boats which fished without clearance cards, aside from placing them on the unfair list as you have testified.

* * *

The Witness: The answer is no.

Mr. Margolis: May I have Exhibit 304, Mr. Clerk?

If your Honor please, on this exhibit 304 there was also an omitted portion on page 1, that is, in the offer, and we would like to offer that omitted portion.

* * *

(Testimony of Gilbert Zafran.)

The Clerk: FF.

(The document referred to was marked Defendants' Exhibit FF, and was received in evidence.)

* * *

Mr. Margolis: This is Exhibit 304, a portion of which is now Defendants' Exhibit FF. It is a copy of the minutes of the regular meeting of Fishermen's Union No. 36, dated June 3, 1946, and portions of the minutes have already been read, and I will read you the portions which have been omitted.

(Whereupon counsel retad to the jury from Defendants' Exhibit FF.) [3010]

Q. (By Mr. Margolis): Now, in that same set of minutes dated June 3, 1946, there appears the statement, "Zafran says that he is of the opinion that any fisherman now declared unfair, we are in a good position to stop unfair albacore fishermen." Does that represent everything that you said on that subject?

* * *

A. I think I recall the meeting now. Just reading the head of the minutes recalls it to my mind.

* * *

Q. (By Mr. Margolis): You attended a meeting at Newport, is that right? A. Yes.

Q. Now my question was whether that paragraph that I read to you—do you have it in mind, the one I read to you? A. Yes.

(Testimony of Gilbert Zafran.)

Q. Whether that represents all that you said or accurately what you said at that meeting.

A. No. it does not represent anything that was said.

Q. Will you tell us what was said on that occasion?

* * *

The Witness: There was a lot of discussion in reference to that particular subject, but what I had said was not simply that we would be in a better position in relation to the unfair boats, but that is the strike had gone along to a point where we did declare boats unfair and actually put it into effect—we hadn't done so and we hadn't contemplated it at that time—but had we declared the boats unfair and put it in effect we then would have been in a better position [3012] to carry it out because the cannery workers were members of an organization and they wouldn't work any fish which was declared unfair, and things along that line.

Local 33 was composed of union people and these of course would support the action, and so forth.

So that definitely rounded the picture out if we did declare the boats unfair, that the other organizations wouldn't take care of the fish handled by unfair boats.

Q. Was any action ever taken by the union to achieve that result? A. No, there was not.

Q. Now on that same exhibit, at the bottom of page 1, there appears, "San Diego was fishing but

(Testimony of Gilbert Zafran.)

on a previous agreement but no minimum price set." Do you recall what was said with regard—I will withdraw that.

Does that represent everything that was said on that subject?

* * *

The Witness: No, it wasn't everything that was said.

Q. (By Mr. Margolis): Will you tell us the substance of what was said on that subject?

A. I think that I was the one that was speaking in this particular instance, and I said that San Diego was fishing on a previous agreement, the previous agreement being that they had agreed with the San Diego dealers that the unions in the area, which are both AFL and CIO in San Diego, would agree or at least set a price in the morning and that that price would prevail throughout the day, and that is what had been going on, and they were fishing on that basis, and I centered around that particular trend of thought.

The Court: That is, that all dealers——

The Witness: In San Diego.

The Court: ——would set the same price?

The Witness: No, not that the dealers would set the price, but the dealers and the union agreed that the union would set the price for the fish for their members that morning.

The Court: The union would set the price of which [3014] everybody would pay?

The Witness: Which all dealers would pay; yes.

(Testimony of Gilbert Zafran.)

Q. (By Mr. Margolis): Was that done by negotiation between the union and the dealers?

A. Yes.

Q. On page 2 of that same exhibit I direct your attention to the following language, "Coleman suggests that we send up a boat to Santa Monica or where needed to help those fishermen dispose of their fish if necessary." Will you state whether or not that was all that was said on that subject?

A. No, that wasn't all that was said.

Q. Will you tell us what was said, the substance of what was said on that subject?

A. The reason Coleman make the recommendation to send a larger boat to Santa Monica to pick up fish there was because——

The Court: You are saying what he said or the reason he said it?

The Witness: That is what he said.

The Court: All right.

The Witness: He said, we should send a boat to Santa Monica to receive fish from the union boats that could not dispose of their fish in that area, and I pointed out that [3015] there was no dispute there, that there was no need for a boat at that time, that everything was going along all right, but should it be necessary to inaugurate that type of service, well that would be something in the future. And that is what was said at that particular time.

Q. (By Mr. Margolis): Was such a service ever inaugurate? A. No. it was not.

(Testimony of Gilbert Zafran.)

Q. Now at the top of page 3, Mr. Zafran, of the same minutes there appears the statement, "We should not allow anyone through our lines no matter what the pretense." Do you remember whether that is an accurate statement or a complete statement of what was said on that subject?

Mr. Rubin: Now, if the Court please, we renew our objection at this time that it is endeavoring to vary the terms of a written instrument.

The Court: No, that objection is not good. Assume you had a written confession of somebody and it was introduced in evidence. He could take the witness stand and say, "I didn't say that," and it would be admissible. Now these were all admitted here as admissions against interest.

Mr. Rubin: If your Honor please, they are admitted, this particular minute is a minute of Newport Beach unit.

The Court: And it is admissible against all defendants as an admission against interest for what they did in the [3016] nature of what you assert to be a conspiracy.

Mr. Rubin: That is correct. It is admissible against them under the laws of conspiracy because they are co-conspirators, but this particular document——

Mr. Margolis: Because they are claimed to be co-conspirators.

Mr. Rubin: Because they are alleged to be co-conspirators, that is correct—but this particular document is neither a confession nor a statement of Mr. Zafran personally.

(Testimony of Gilbert Zafran.)

The Court: It is an admission against interest against all of them, therefore anyone who is present and knows what happened can get up and deny that it happened, that is true, or, if he wishes, he can testify as to it.

Mr. Rubin: This isn't a denial, it is in the nature of an explanation or modification.

The Court: Anyhow, it is admissible.

Q. (By Mr. Margolis): Do you remember the question?

A. I wish you would have it read.

Q. It might be quicker if I rephrased it.

Referring to the language. "We should not allow anyone through our line no matter what the pretense," tell us what was said on that subject.

A. Well, in the first place the wording that we should not allow was not used because we didn't endeavor to stop [3017] anyone other than to ask their cooperation, and what was said on that subject was that anyone who wanted to go through the lines, irrespective of our asking their cooperation not to, that any pretense that they may give to the picket captain should be disregarded and let it go at that. Of course if they went through, that was their business, they went through, but we wouldn't take all and every pretense for going through.

The Court: Are you saying now what was said or are you explaining it?

The Witness: No, that is what was said.

The Court: Who said this?

(Testimony of Gilbert Zafran.)

The Witness: It was said during the course of the discussion.

The Court: Who said it?

The Witness: I don't know exactly who said it, but I know that this is what had been said.

Q. (By Mr. Margolis): Was this discussion participated in by just one person or were there several people?

A. There were several people who participated in the discussion. I remember the discussion because it was of a vital nature, referring to people going through a picket line, and that is how come I more or less remember the discussion from the standpoint of the way I have explained it. [3018]

Q. What was said then was that no permission would be given to go through under any pretense, is that right? A. That is right.

Q. Now during the course of the strike was any boat stopped from getting fuel or supplies?

* * *

The Witness: I know of no boats that were stopped.

Q. (By Mr. Margolis): Were you generally familiar with the situation during the strike?

A. Definitely.

Q. Now Government's Exhibit 214, which is the strike committee minutes of June 4, 1946, there appears a reference to a motion to contact Joe Harris at Union Ice Company, Terminal Island, and he be asked to honor our clearance cards and not to deliver ice to any fresh fish boat who doesn't have one.

(Testimony of Gilbert Zafran.)

I will ask you whether or not any action was taken with regard to carrying out that motion.

A. To my knowledge, no action was taken.

* * *

Q. (By Mr. Margolis): Were you generally in charge of the activities that were being conducted?

* * *

The Witness: Yes.

Q. (By Mr. Margolis): Were you given information by the members of the activities in which they engaged?

A. That's right.

Q. Did you ever hear of any action being taken in connection with this matter?

A. I didn't hear of any.

Q. Do you know of any boat not getting ice on account of any action taken by the union?

A. As I testified before, no.

Q. Mr. Zafran, I want to direct your attention to Defendants' Exhibit W-1, being the letter dated June 28, 1946, [3020] sent to the San Pedro fish dealers, and also to other fish dealers, with regard to the termination of the strike. Do you recall that letter?

* * *

A. Yes.

* * *

Q. (By Mr. Margolis): Following the sending out of this letter, was delivery of fish to San Pedro and Newport dealers who had theretofore been picketed resumed?

A. Yes.

Q. When was that done?

(Testimony of Gilbert Zafran.)

A. The fishing in San Pedro was resumed on July 1st.

Q. When was it resumed in Newport? Well, the delivery of fish in San Pedro was resumed then?

A. The pickets would be taken off as of that date, and fishing could be resumed then. If anyone had fish or went out the night before they could unload fish that morning at the markets.

Q. When were the pickets removed from Newport Beach?

A. It was shortly following that period. I don't know the exact date, but it was a short time following that.

Q. Was any action taken by the union following that with regard to establishing or maintaining any minimum price?

A. Yes. [3023]

* * *

Q. (By Mr. Margolis): What was done?

* * *

A. There was a man hired by the union to be at the fish dock at all times to endeavor to maintain a verbal minimum with the dealers. If I might clear that up a little. The contracts which had been in existence had a minimum price. Those contracts which had been signed had a minimum price, and we wanted to establish that particular minimum. The man on the dock was going to endeavor to get that minimum price for our members with the dealers, and that is the action which was taken by us to maintain those minimums.

(Testimony of Gilbert Zafran.)

Q. (By Mr. Margolis): What happened with regard to it?

A. It lasted for a couple of days and it gradually broke down to a point where there was no use of having a man on the dock because——

Mr. Rubin: Just a moment, if your Honor please. The rest of this calls for a conclusion.

The Court: That is a conclusion.

Q. (By Mr. Margolis): The prices were not maintained, is that right?

A. That is right.

The Court: You mean the dealers didn't pay the same prices?

The Witness: I mean they didn't pay the minimums which [3024] our agent asked to be paid to the men——

The Court: You mean all dealers didn't say they would pay the same minimum, is that what you mean?

The Witness: I mean that all dealers did not pay the minimum.

The Court: Different dealers paid different prices?

The Witness: No, sir; they all paid the same, but they didn't pay the minimum.

The Court: They all paid the same but they all paid less?

The Witness: That's right.

The Court: Than this price which you endeavored to establish as a minimum?

The Witness: That's right.

The Court: All right.

(Testimony of Gilbert Zafran.)

Q. (By Mr. Margolis): Mr. Zafran, I want to direct your attention for a moment to Government's Exhibit 208, which is the minutes of the strike committee meeting of Local 36 for May 31, 1946, and particularly the publicity committee report saying, "Letters have been drawn up and will be distributed." Will you state what letters are referred to there, if you know?

A. The letters referred to in that instance are the letters which were going to be distributed to the various boats in the harbor area telling them what—

The Court: Are they in evidence here, counsel?

* * *

Q. (By Mr. Margolis): Were those letters kept? A. I don't think they were kept.

Q. This was something that was distributed around? A. Yes.

Q. You know what it was, however?

A. It was simply stating there was a strike in effect and we desired their co-operation, and words along that line. The committee or the members were going to distribute these letters to the various fellows on the boats so they knew what the score was.

* * *

Q. Now, Mr. Zafran, I want to direct your attention to Government's Exhibit 228, which is the strike membership minutes of Local 36 for June 15, 1946, and particularly to the last item on page 1 of that exhibit: "Question of jurisdiction brought up by members, whether or not members of Local 33 would have to pay fines, etc., or if members who are

(Testimony of Gilbert Zafran.)

fishing cannery fish would make any difference regarding payment of fines and picket duty." Now will you state whether that was all that was said or whether that accurately reflects what was said?

The Court: Were you at the meeting? [3029]

The Witness: Yes, I was definitely at the meeting.

* * *

Mr. Margolis: "Brother Jeff Kibre, International secretary-treasurer, points out that all small boat fishermen are involved whether belonging to another local or fishing for canneries, that at one time or another they will be fishing market fish, that one small boat problem concerns all small boats, that there should be no jurisdictional beef as between locals and types of fish at this time when cooperation is so needed, that fish is fish and a problem of every fisherman. Furthermore points out that the dealers are waiting for albacore to show up thinking that the fishermen will go hog-wild and forget about the strike, that this is exactly what we must prepare for, get a program in motion before we go out for albacore that will carry the strike through to a victorious finish while we are out fishing. This means cooperation from all boat fishermen."

Q. Now in addition to what I have read, was there anything else said on that subject?

A. What was said in addition to that was that the members of the union, all members of the union were involved in this thing, and however some of

(Testimony of Gilbert Zafran.)

them were fishing cannery fish and some were fishing market fish, but irrespective of that that all those members who are members of the union are involved in this thing and we should all work together on this question. I think you have asked another question a while ago about purse seines, didn't you? [3032]

Q. Well, I want to know if anything at all was said as to the whole thing I read. It was broken up into two parts. Whether or not members of Local 33 would have to pay fines, et cetera, was one of the subjects which is mentioned here; my question includes that reference.

A. Well, that is what I wanted to bring out, because I believe you did ask it. This was said about the purse seines. There are a number of purse seine boats, small purse seines, that fish fresh market fish a good portion of the year and at this time——

Q. Are those members of Local 33?

A. They are members of 33. And this particular time of the year they were fishing fresh market fish, so it was pointed out that in view of the fact that this dispute was affecting all fresh market fishermen, irrespective of the fact that they were members of Local 33, that they also should be in the same position as members of Local 36 who were in this thing all the way. That is what we said with reference to the purse seines.

Q. I direct your attention to Government's Exhibit 209, being a letter dated—copy of a letter dated July 9, 1946, addressed to Dear Brother

(Testimony of Gilbert Zafran.)

Hauser, and signed Gilbert Zafran, Secretary, the first paragraph of which reads: "As you have noticed in the minutes of our last central executive board meeting a motion was passed that a letter be sent to all [3033] dealers who have not as yet signed an agreement or agreed to recognize the union as the bargaining agent for the fishermen. I am enclosing a letter which I have drafted up for that purpose and had checked by the attorney for any damaging language." What letter was referred to in that paragraph?

A. That was the letter in which we asked the co-operation of the Santa Barbara dealers on the basis of minimum prices, and we wanted them to go along with the union's policy of minimum prices in the Southern California area.

Q. I think that letter has previously been referred to and has been put in evidence. Do you remember that letter?

A. I believe it has been read to the jury.

Q. All right. But it is the one to the Santa Barbara dealers?

A. Yes.

Mr. Rubin: I believe it is 210. Is this the letter you want, Mr. Margolis?

Q. (By Mr. Margolis): Is this the letter that you referred to? This is Government's Exhibit 210. No; this is the same one.

The Court: Well, let's move on.

* * *

Mr. Margolis: I want to tie it in, your Honor.

Q. (By Mr. Margolis): Is that the letter?

A. Yes, I believe that is it.

(Testimony of Gilbert Zafran.)

Q. There was some testimony about a conversation that you were supposed to have had with a Mr. Naylor, page 1602 and 3 of the transcript; do you recall Mr. Naylor testifying? A. Yes.

Q. Did you have a conversation with Mr. Naylor?

A. Yes, I did. I don't recall the date, but it was shortly after the termination of the strike.

Q. Mr. Naylor is the man from Newport Beach, is he not?

A. It was in relation to the termination of the strike.

Q. Was that a telephone conversation or in person?

A. That was over the telephone.

Q. Will you tell us what was said in that conversation?

A. He asked me if the San Pedro boys were going to go fishing. I said yes they were on the basis of this letter which had been drafted by the two attorneys, that is, the two letters; that on the basis of those letters we were going to go fishing. He said if the Newport dealers—that is, if the picket lines in Newport were going to be removed. I said they would be removed on the same basis as they were here in relation to these letters. [3035]

* * *

Q. Will you look at W-1?

A. (Examining document) This is the letter that I am referring to at this time.

(Testimony of Gilbert Zafran.)

Q. It was shortly after that letter or about the time of the sending of that letter that you had the conversation, is that correct?

A. Yes, I believe so.

Q. Now had you finished—I don't remember whether you had finished your answer about the conversation or not. Had you?

A. Well, no, I hadn't expect that he asked me whether or not we were going to remove the pickets, or what we were going to do with the Newport situation, and I said that would be up to the Newport boys as to what they were going to do down there, as I recall the conversation itself.

Q. Was there anything else said? [3037]

A. Not substantially that I can recall.

* * *

Cross-Examination

By Mr. Dixon:

Q. Mr. Zafran, are you employed by anyone else other than Local 36?

A. I am not.

Q. Have you been employed by anyone else other than Local 36 during the last two or three years while you have been business agent of Local 36?

A. Not since I have been business agent, no.

Q. How long have you been business agent of Local 36? A. Since June of '45.

Q. June of '45? A. Yes.

(Testimony of Gilbert Zafran.)

Q. Since that time you have been employed exclusively by Local 36, is that right?

A. That is right.

Q. Prior to that time were you employed by anyone else other than Local 36? A. Yes.

Q. By whom?

A. I was working for the California Marine Curing and Packing Company.

Q. In what capacity? [3038]

A. Warehouse foreman and contact man.

Q. Were you working for Local 36 parttime at that time? A. No.

Q. Were you working for Local 36 in an official capacity at all during that time?

A. Definitely not.

Q. So that your official connection with Local 36 dates from July of 1945, is that correct?

A. That is right.

Q. Now, Mr. Zafran, I believed you testified that you were among those members of the committee from the union that present contract Exhibit 2 to Mr. Ross in the latter part of May 1946, is that correct? A. That is right.

Q. I believe you testified that Mr. Ross told you that he could not and would not sign the contract presented to him because of this indictment that you have described, is that correct?

A. That is right.

* * *

Q. After Mr. Ross had told you that he could not and [3039] would not sign the contract, did you

(Testimony of Gilbert Zafran.)

state to Mr. Ross that "Ways and means would be found to compel us to sign that contract"?

A. I made no such statement.

Q. Did you make any statement to Mr. Ross comparable to that effect?

A. Positively not.

Q. What other conversation with reference to his signing the contract did you have, if any, other than what you have described?

A. The only conversation that we had with relation to the contract was that we try to convey our position to him and show the fairness of the agreement and try to endeavor to get him to see our side of it and decided it on the ground.

Q. Was that after he told you he couldn't and wouldn't sign the contract?

A. We started out before and after.

Q. Now you were also with the committee that presented the contract Exhibit 3 to Mr. Vitalich, were you?

A. That is right.

Q. And do you recall your conversation with Mr. Vitalich at the time you presented the contract to him?

A. Yes.

Q. Did you tell Mr. Vitalich at that time, "Well, read it and sign it; I will pick it up," referring to the contract [3040] Exhibit 3?

A. Not in those words.

Q. Did you have any conversation with him which was substantially to that effect, Mr. Zafran?

A. It wouldn't be substantially to that effect; no.

(Testimony of Gilbert Zafran.)

Q. Now you were on the committee that presented the contract to Mr. Demeglio, were you?

* * *

A. Yes. [3041]

* * *

Q. Mr. Zafran, did you say to Mr. Demeglio at the time you presented him with the contract, "You look it over, look it over and sign it, and then we will pick it up"?

A. Not in those words, we didn't say it.

Q. Now did you tell him anything to that effect?

A. Well, you could construe it as that; yes.

Q. Can you recall the substance of the words that you used at the time you handed the contract to Mr. Demeglio? A. Yes.

Q. Was it different from what I have just stated?

* * *

The Witness: Yes, it is different from the way that you just read it.

Q. (By Mr. Dixon): Can you recall, and will you now state to the jury, what you claim you told Mr. Demeglio at the time you gave him the contract?

A. Yes. We gave him the contract, as we did to all [3042] other dealers, and we discussed it.

Q. I am asking you now what you said to Mr. Demeglio at the time you gave him the contract.

A. That is what I am trying to tell you.

Q. Just tell me that, please.

The Court: Just say what, in substance, was said.

(Testimony of Gilbert Zafran.)

The Witness: We asked Mr. Demeglio, we gave Mr. Demeglio the contract and asked him to look it over, and he started to read it, and we went into the discussion with him, as we had with the other dealers, and he said, "Well, I will have to look this over because I have partners and we will want to check the thing over and we will let you know."

I said, "All right. You look it over and we will be back and pick it up."

Q. (By Mr. Dixon): So that after Mr. Demeglio had looked it over you told him you would be back to pick it up, is that correct?

A. Yes.

Q. And did you mean when you came back to pick it up that you would come back to pick up the signed contract?

A. If it was signed.

Q. Mr. Zafran, you were a member of the committee which passed on clearance cards that you have heard described here many times during the course of this trial, were you?

A. I was not a member of that committee.

Q. Well, as business agent of Local 36 there was a clearance card system that was used during the course of this so-called strike in June of 1946, wasn't there?

A. There was.

Q. And it is a fact, is it not, Mr. Zafran, that non-members of Local 36 secured these clearance cards from the union, isn't it?

A. Yes.

Q. And at the time these cards were secured, can you state whether or not they were granted

(Testimony of Gilbert Zafran.)

unless the person securing the card had done picket duty for the union?

A. The clearance cards were granted, to my knowledge, whether or not he did picket duty.

Q. Do you say that any fisherman, then, could merely get a clearance card from your union by coming in and asking for it and nothing else, is that correct? A. That is not correct. [3044]

Q. Is that a fact?

A. That is not correct.

Q. What other requirements were there for a non-member to get this clearance card to fish?

A. If a non-member came in to get a clearance card, he came in asking for a card; we told him what our position was, what was required of the members of our organization, and if he wishes to comply, that we expected him to do the same, and if he did that, then he would say, "Well, I will picket," "I am going to picket," and he would give the picket captain, or whoever was on the registration committee, the time that he said he would, and a clearance card was issued. Whether or not he picketed was something that was determined later. But he was on or a picket time, and either he showed up or he didn't. That was something that was determined later by the card itself.

Q. Do you know as a fact whether any of these clearance cards were given to any non-members except those who picketed?

A. That I can't say.

Q. Well, you were business agent of the union, were you not?

(Testimony of Gilbert Zafran.)

A. Yes, but I didn't check every picket card.

Q. If there was any such cards that were given to non-members who did not picket, would you know of them?

A. Not at this time, I wouldn't. I wouldn't know at [3045] that time.

Q. You wouldn't know at that time?

A. No.

Q. As far as you know, then, of your own personal knowledge all of the non-members who got clearance cards did picket duty, is that correct?

A. So ar as I know.

Q. After these non-members secured the clearance card were they told by you or anyone in the union, to your knowledge, as to where the fish that they caught could be sold?

A. We didn't tell any of them where the fish could be sold. We told them who had signed the agreement and what our position was.

Q. And you indicated to the non-members who got these clearance cards that the signing dealers were the ones to whom the fish could be sold when caught by the fishermen, is that correct?

A. The signing dealers, as far as we were concerned we were selling our fish to them, yes.

Q. I will hand you what is known as Government's Exhibit 203, already in evidence, and ask you to examine the same and state to the court and the jury whether you sent that letter to the person named as the addressee therein.

A. This appears to be the one I did send.

(Testimony of Gilbert Zafran.)

Q. (By Mr. Dixon): It is a fact, is it not, Mr. Zafran, as stated in Government's Exhibit 203, that you had already decided on May 17, 1946, that the contract, Exhibit 3, would be presented to each dealer in the Southern California area, and that they would be given 48 hours to sign the contract, and that, quote, "If the contracts are not signed by 7:00 a.m. Wednesday we will establish picket lines and stop all fishing for fresh fish in Southern California," end quote?

* * *

A. No.

Q. (By Mr. Dixon): Do you mean that had not been decided at the time you sent this letter to your president of the International Fisherman & Allied Workers of America on May 17th?

A. That was not definitely decided on May 17th.

The Court: You mean it had not been previously decided?

The Witness: It had not been definitely decided by all that these agreements were going to be sent to everyone. It was a tentative agreement that we had agreed on, but the way it was put here it is a definite decision. The decision was not definite on May 17th. However we did inform the president of the International that this action was going to be taken if such-and-such wasn't done.

But that wasn't a definite decision, and other decisions were made following that which were definite.

* * *

GEORGE KNOWLTON

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Andersen:

Q. Your name is George Knowlton and you are one of the defendants in this case?

A. Yes, sir.

Q. You are a fisherman by trade and occupation, are you? A. Yes, sir.

Q. Will you speak louder so we can all hear you?

A. Yes, sir.

Q. You own a fishing vessel, don't you?

A. Yes, sir.

Q. And is the name of that fishing vessel the America II? A. America No. 2, II, yes.

Mr. Andersen: I assume it may be stipulated that was the fishing vessel that was shown in the motion picture here the other day?

Mr. Rubin: We will be glad to stipulate to that. So stipulated.

Q. (By Mr. Andersen): You are the man who smokes a cigar all the time——

A. Except in court.

Q. ——on the bridge? By the way, to refer again to that fishing vessel briefly, is that a typical fishing trip?

A. For wintertime it is a typical fishing trip.

Q. How long have you been engaged in the fishing industry?

(Testimony of George Knowlton.)

A. Well, I have been engaged since 1919. Continuously since 1922, but I have been in it since 1919.

Q. From 1922 or 1919, whichever date it is, have you been continuously engaged in the fishing industry in this area?

A. Well, except for small, short periods of time, you might say two or three months at a time, yes.

Q. Well, fishing has been your chief occupation?

A. It has been my entire occupation. What I mean by that is I do not always fish around this area. I might fish out of some other locality. [3050]

Q. What other locality do you fish out of?

A. Well, it is according to the type of fishing. It possibly could be any port on the Pacific Coast.

The Court: You mean you have fished out of all ports on the Pacific Coast?

The Witness: Most of the ports on the Pacific Coast.

The Court: Most all of them?

The Witness: Yes.

The Court: You have fished out of other ports, too?

The Witness: Yes.

Q. (By Mr. Andersen): Have you always owned your own boat or have you worked as a boat puller?

A. I have worked as a boat puller.

Q. How long did you work——

The Court: All right. Boat puller. That is a new one on us. What is a boat puller?

(Testimony of George Knowlton.)

The Witness: That is a trade name for a crew member.

The Court: Who does not own his boat?

The Witness: Yes, sir.

The Court: Or any interest in a boat?

The Witness: Yes, sir.

Q. (By Mr. Andersen): How long did you work as a crew member?

A. Well, it was different times. I worked around '22 [3051] and '23 as a crew member, I believe, somewhere in that time. It is such a long time ago it is pretty hard to tell accurately.

* * *

Q. You bought your first boat about what time?

A. About '23, I believe.

Q. And since 1923 have you operated your own boats or have you worked as a crew member?

A. I have done both. I have operated my own boats or have you worked as a crew member?

Q. You bought your first boat in 1922. How long did you operate that boat?

A. I believe two or three years.

Q. Then did you sell it or trade it in on another one? A. I sold it.

Q. Then did you buy another boat or did you work as a crew member.

A. Another fellow and myself went in partners on a boat.

* * *

(Testimony of George Knowlton.)

Q. From 1922, when you purchased your first vessel, or boat rather, how many of the intervening years have you fished as a crew member rather than boat owner?

A. I would say not more than a total of two years.

Q. The rest of the time as a boat owner?

A. Yes, sir.

Q. Your first vessel, how much did it cost?

A. \$250, approximately.

Q. Then you went in with Charlie Taylor and bought a second boat thereafter?

A. Yes, sir.

Q. What did that vessel cost?

A. I believe it was around \$800.

Q. How long did you fish on that boat?

A. I believe it was about a year and a half.

Q. About that time did you also fish or work as a fishing captain on other vessels?

A. At that time we lost that boat, it was blown up, and we had no more boat so I operated another boat as a fishing captain.

Q. And as a fishing captain in the fresh market fleet or in another fleet?

A. At that time there was no local cannery fish, it was all fresh fish markets. [3053]

Q. How long did you work as a fishing captain?

A. One year.

Q. By the way, that simply means the captain of a fresh fish market boat, isn't that correct?

A. Yes.

Q. How long did you work in that manner?

A. That was one year.

(Testimony of George Knowlton.)

Q. Then you bought another boat, did you?

A. Yes, sir.

Q. And what the size of it?

A. Fifty-four foot boat.

Q. What did it cost?

A. The original cost was \$3,000, that is, that is what I paid for it, was \$3,000.

The Court: A new boat?

The Witness: No, old boat.

Q. (By Mr. Andersen): How long did you use that boat? A. About six years.

Q. What happened to it?

A. Well, I made a down payment of \$1,000 on it and during the six years I operated it and paid an average of \$250 a year on it. At the end of the six years, interest and insurance had accumulated up to \$3,400, so I turned it back to the cannary.

Q. What cannery was that?

A. That was Van Camp cannery.

Q. Then after you turned that vessel back to the cannery did you again work as a fishing captain?

A. For part of a year; I can't tell you exactly how long.

Q. Then you bought another boat, did you?

A. Then I bought another boat.

Q. That was in about 1935 or '36? A. 1936.

Q. What sort of a boat was that?

A. That is the present boat I have, the America II.

Q. What is the usual size of the crew on that boat?

(Testimony of George Knowlton.)

A. It varies according to the season. In winter-time it is generally a 3-man crew; in the summer-time from 5 to 6.

The Court: What is the size of the boat?

The Witness: Forty-five feet.

Q. (By Mr. Andersen): How big is it?

A. Forty-five feet long.

Q. How much did you pay for it?

A. The price was \$2,500.

The Court: When?

The Witness: In 1936. [3055]

Q. (By Mr. Andersen): You bought it in 1935 for \$2,500? A. 1946.

Q. How much do you still owe on it?

Mr. Rubin: That is objected to as immaterial, if your Honor please.

The Court: I do not think it is material, counsel. Objection sustained.

Q. (By Mr. Andersen): With respect to the maintenance of the vessel, I assume that you maintain it in the same general nature that has been heretofore mentioned, is that correct?

A. Yes.

Q. Of course when you fish, this vessel gets a share of the fish in the same manner that has been testified here by other men who own boats?

A. Yes.

Q. There is no difference, is there?

A. No difference. [3056]

(Testimony of George Knowlton.)

Q. Approximately how many months of the year is the vessel laid up during which time you are repairing it and readying it for fishing voyages?

A. Well, we change different operations so much that I should say between two and three months of the year.

* * *

Q. During that time do you work on the vessel?

A. Yes.

Q. Now with respect to the sale of fish, do you recall these fishing tags? A. Very well.

Q. Those are photostatic copies of them. Every time you deliver fish to a fish market you of course get fish tickets of that general nature, do you?

A. Yes.

Q. And those tickets are the tickets that *are usually* used as the medium through which you are paid, that [3058] *is*, you are paid according to the price shown on the fish tickets, is that correct?

A. That is correct.

Q. Now during the *many that* you have been selling fish to the fish dealers at San Pedro on a day-by-day basis, and regardless of which dealer on the dock there at San Pedro to whom you sell the fish, has there *every* been any variation in the price paid to you for a particular type of fish?

Mr. Rubin: Just a moment. If your Honor please, that is objected to as completely immaterial and was the subject of your Honor's instruction to the jury this morning.

(Testimony of George Knowlton.)

The Court: Yes. We have gone over that before. The objection is sustained.

Q. (By Mr. Andersen): Were you ever on the picket line at a time when Mr. Vitalich, one of the witnesses who testified here earlier, was present?

A. No, I was never on the picket line when Mr. Vitalich was around.

Q. Did you ever have any conversation with him at all at any time when you were on a picket line?

A. I was not on the picket line.

Q. Did you ever have a conversation with him during the period of the strike?

A. I may have. I believe that I was present at one of [3059] the meetings that he was at. That is the only time it could have been.

Q. Did you personally have any conversation with him? A. No, not personally.

The Court: What was his name?

The Witness: Vitalich.

The Court: Didn't you ever sell him any fish?

The Witness: Oh, yes; I have sold him fish.

The Court: When you say you have never had any conversation with him, you mean during the strike?

The Witness: During the strike.

Q. (By Mr. Andersen): Do you know a man named Castagnola?

A. I know several Castagnolas. If you are referring to the one that testified on the stand, yes.

Q. Do you recall having a conversation with Mr. Castaglona?

(Testimony of George Knowlton.)

A. I can remember Mr. Castaglona coming to me and asking my advice on the situation.

Q. Do you recall when that was?

A. Not definitely.

Q. Do you recall any conversation that you had with him and who was present?

A. No. I believe there was some other members of the strike committee there. I could not name them. The conversation was what he could do to get to go fishing.

Q. Just what did he say to you?

A. I cannot quote him.

Q. Substantially.

A. He asked what to do to get a clearance permit.

Q. What did you tell him?

A. I told him that it would have to be taken up with the committee.

Q. Did you say anything else to him at all?

A. That was practically all there was to say.

Q. Do you know a witness named Stagnaro?

A. Yes, sir.

Q. How long have you known him?

A. Well, I believe as long as he has been fishing in San Pedro. I couldn't say how long because it was quite a number of years, at least 10 or 12 years.

Q. Did you always get along with him all right?

A. Very friendly.

Q. And during the period of the strike did you have a conversation with him?

(Testimony of George Knowlton.)

A. The way I remember, the circumstances were almost identical with Mr. Castagnola, and the conversation was just about identical.

* * *

Q. In any event, your conversation with Stagnaro was a friendly one, on a friendly basis, was it?

A. Yes.

Q. Do you know the witness Falcone?

A. Yes. [3062]

Q. Did you have any conversation with him during the period of the strike? It is at page 893.

A. Practically the same conversation.

Q. Just repeat it, please.

A. Well, he asked me what would be the procedure to get a clearance permit, and I told him he would have to go before the application committee and have it passed on.

Q. Did you also have conversations of the same general nature with the witness named Guglielmo?

A. I presume I did. I know all the fishermen that were on the stand here, but their names baffle me at times.

Q. And also with a witness named Bregante?

A. Yes.

Q. Also a witness named Vestal? A. Yes.

Q. Also a witness named Tufts? A. Yes.

Q. With respect to Bregante, Guglielmo and Vestal were the conversations substantially the same? A. All except with Vestal

Q. How long had you known Vestal?

A. I should say about four or five years.

(Testimony of George Knowlton.)

Q. What was the conversation you had with him?

A. It was on somewhat the same order. He asked me my opinion. I gave him my opinion. [3063]

Q. Vestal's testimony is at page 994 in the record. What did he say to you?

A. He was working in the cannery at the time and he said he would be unable to go on the picket line. I remarked that he wasn't working 24 hours a day and he could go on nighttime picket line if he wanted to, if he wanted to work with us.

Q. Well, at that time did you say to him that he should do picketing otherwise he wouldn't be able to go out and fish?

A. I definitely did not say that.

* * *

Q. Was your conversation with Mr. Tufts substantially the same as with Bregante and Falcone?

Mr. Andersen: 1016.

A. My conversation with Mr. Tufts was entirely in a different—

Q. (By Mr. Andersen): When and where did you have your conversation with him?

A. Johnny and myself had arguments — I wouldn't say arguments, but discussions on union problems off and on in different localities, and I believe the last discussion was over near the Southern California Cannery.

Q. Did you ever have any conversation with Mr. Tufts—this is at the bottom of 1016 and 1017 of the record—wherein you told him that he wouldn't be

(Testimony of George Knowlton.)

able to buy ice unless he [3064] co-operated with the union. A. Not exactly that.

Q. What did you tell him that was in relation to that?

A. I believe I told him that there was possibilities of the strike went long enough that it could go to that extreme. But I did not tell him definitely that that was a fact.

Q. With respect to gasoline, did you tell him that he would not be able to buy any gasoline if he did not co-operate with the union?

A. If I did, it would be an indefinite situation, that there was possibilities that he wouldn't be able to. It would have been a definite statement.

Q. Now, your conversation with Mr. Tufts at that time, was it a friendly conversation?

A. Very friendly.

* * *

Q. (By Mr. Andersen): In any of your conversations with Mr. Tufts was there any ill will expressed by Mr. Tufts——

* * *

A. Mr. Tufts at one time told he if he ever had to go on the stand he would testify that the reason he joined [3066] the union was to keep from getting his boat sunk. He also qualified his statement. May I carry this on as a two-way conversation, or just what he said?

The Court: I think you had better lay some foundation.

Q. (By Mr. Andersen): When did he tell you this, Mr. Knowlton?

(Testimony of George Knowlton.)

A. Well, I believe it was shortly after the indictment, or sometime after that. I can't recall.

Q. After the indictment. Well, I am talking about this conversation during the strike, Mr. Knowlton.

A. This conversation during the strike?

Q. Yes, this conversation that you had with him about the gasoline and the ice.

A. Will you repeat the question again?

Q. During that conversation did Mr. Tufts use any words expressing any ill will existing between you and Mr. Tufts? A. Never.

Q. Now, with respect to this latter statement that you made, how did that happen to come about and when was it?

* * *

A. As I say, sometime after we was indicted. I can't place the time very closely.

Q. Would you say a week or a month or two months afterwards?

A. Sometime, I believe it was in November.

Q. And where was the conversation held?

A. It was over on the fish harbor.

Q. Were you still friendly at that time?

A. Yes, sir.

Q. How did he happen to make such a statement as that to you, if you know? What was the subject you were discussing? A. I asked him about it.

Q. You asked him about what?

A. A remark was made by the grapevine, as you might get it, that he made a remark that he joined

(Testimony of George Knowlton.)

to keep from getting his boat sunk, and I wanted to ask for firsthand information, so I asked——

* * *

Q. (By Mr. Andersen): In other words, this, simply, that you heard was just hearsay?

A. Until I got it from him directly. [3068]

Q. Then you went and talked to him?

A. Yes.

Q. And this is the conversation that you referred to a few moments ago? A. Yes.

Q. Did you ask him the source of the statement?

A. I asked him the source of the statement, and also asked him who threatened to sink his boat.

Q. Yes? A. He said nobody.

Q. Did you ask him why he made the statement?

A. Yes, I asked him why.

Q. What did he say?

A. He said a long time ago there had been boats sunk, I think the last case had been about 15 years ago, and he wasn't taking the risk, so that is what he was going to testify if he ever had to go to court.

Q. Did he say what was the basis of his statement? A. That was the basis of his statement?

Q. I see. Do you know if he is presently a member of the union?

A. According to his testimony he is not. [3069]

* * *

Q. By the way, at the time of the strike was Mr. Tufts fishing cannery fish or market fish, if you know?

A. He was not doing either. He was working in the cannery.

(Testimony of George Knowlton.)

Q. He was what?

A. He was working in the cannery.

Q. In what capacity, if you know?

A. I believe as a sort of a foreman on maintenance work.

* * *

Cross-Examination

By Mr. Dixon:

Q. Mr. Knowlton, I believe you testified you were never on the picket line during the course of the strike, is that correct?

A. Never had a picket badge on me. I might have been near the line, but I never had a picket badge on me.

Q. Did you ever do any picket duty during the strike? A. I was in the office.

Q. Did you pay any fees to the union for not picketing? A. Yes.

Q. In other words, instead of doing the picketing you paid for not doing the picketing yourself, is that correct? [3070]

* * *

A. Yes.

Q. (By Mr. Dixon): You are the owner of this boat America II? A. Yes.

Q. And any fish caught by you or your boat are sold by you to whoever buys them, is that correct?

A. Not necessarily.

Q. The fish tickets are made out to you——

* * *

The Witness: Yes.

(Testimony of George Knowlton.)

Q. (By Mr. Dixon): And you received the compensation or the money from the dealer to whom the fish is sold, did you not, Mr. Knowlton?

A. I collect; yes.

The Court: What is the difference between collecting and receiving?

The Witness: Well, I understand if you get the compensation for it that is mine. It isn't all mine.

Mr. Dixon: That is all, your Honor.

The Court: What you meant was that you got the money and you distribute the shares, is that what you meant?

The Witness: Yes.

The Court: Very well. Step down.

(Witness excused.)

Mr. Margolis: Your Honor please, one matter with regard to the proceedings tomorrow that your Honor might want to take into consideration at this time, we intend to offer two [3073] expert witnesses with regard to certain matters and in view of some of your Honor's rulings there may be a question as to your Honor's rulings on the admissibility of that testimony.

The Court: I can excuse the jury now and we can take it up.

Mr. Margolis: I just wanted to state that, in order to shorten the proceedings we have prepared in written form what we intend to prove. It is being typed up now.

The Court: An offer of proof?

Mr. Margolis: We thought we might submit it in advance to your Honor.

* * *

(The jury retired from the courtroom at 4:25 o'clock p.m.)

The Court: You think you can finish the whole testimony tomorrow?

Mr. Margolis: With the exception of this matter on which your Honor will have to pass. I don't know whether your Honor will say it is admissible or not. The point is, we thought we could save time by doing it this way. We know that some of the matters we want to submit as an offer of proof your Honor has already ruled on as not admissible, but we do want to get it in. There is another matter about which we are doubtful. We would like to submit it all and if your Honor will indicate what subject matter is material we will limit ourselves except for the purpose of the offer of proof.

The Court: How long will this document be? Could I [3075] read it at noon recess?

Mr. Margolis. That would be rather difficult, your Honor.

Mr. Kenny: One is an agricultural economist. I haven't seen his material but I am sure that it is not noon hour reading.

The Court: And the other is a fish economist, I suppose?

Mr. Margolis: The other, your Honor, is just some research work that has been done which is a tabulation of figures and data from various sources. I don't remember the number of pages, but it is 30 or 40 letter-sized pages, with a number of charts attached.

* * *

Mr. Margolis: Of course we would have to have a stipulation that we could make our offer in that form.

Mr. Dixon: That will be all right, counsel. There will be no objection to that.

* * *

Mr. Margolis: If your Honor please, we have handed up to the Court an offer of proof.

The Court: This is your offer of proof?

Mr. Margolis: This is one of them. The other will be ready sometime today.

(Here followed further discussion between Court and counsel which was reported but not transcribed. During this time the offer of proof referred to was received and marked Defendants' Exhibit GG for identification.)

(The jury returned to the courtroom at 10:20 o'clock a.m.) [3080]

* * *

WALTER B. McCOMAS

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Margolis:

Q. Mr. McComas, you are the W. B. McComas who is one of the defendants in this case?

A. That is right.

Q. And you live at 482 North Cherokee with your family? A. 842.

Q. 842 North Cherokee with your family, is that right? A. Yes.

Q. You are a married man with a family, is that right? A. Yes.

Q. Now you earn your living—I am going to ask some leading questions because your Honor suggested that to permit the speeding up, and if there is any objection I will desist—your occupation is fishing, is that right? [3081] A. Yes, sir.

Q. That is how you earn your living?

A. That is right.

Q. And you have no other source of income?

A. No.

Q. Is that right? A. That is right.

Q. Now you started fishing commercially sometime during the year 1942? A. That is right.

Q. And you have been fishing for a livelihood ever since? A. Yes.

(Testimony of Walter B. McComas.)

Q. By fishing I mean that you have been working on a commercial fishing boat, is that right?

A. That is right.

The Court: What was the year again?

The Witness: '42.

The Court: 1942.

The Witness: That is right.

Q. (By Mr. Margolis): Mr. McComas, you did fish commercially one season before 1942, did you not? A. That is right.

Q. When was that? [3082] A. '23.

Q. You fished one season out of San Diego, working on somebody else's boat? A. Yes.

Q. Now when you started fishing in 1942 did you buy a boat? A. I did.

Q. What size boat did you buy?

A. Thirty-six foot.

Q. How much did you pay for it?

A. A thousand dollars.

Q. Was this boat a boat which you operated by yourself or did you have a crew in addition to yourself? A. No. I had a crew on that boat.

* * *

Q. How large a boat?

A. Two, including myself.

* * *

Q. You sold that boat, did you, in 1944?

A. I did.

Q. About that time you purchased another boat, a smaller boat? A. That's right.

Q. What size boat was this?

A. 26-foot.

(Testimony of Walter B. McComas.)

Q. And this boat, Mr. McComas, was a one-man boat, is that right? A. That's right.

Q. So since purchasing that boat in 1944 you have operated this one-man boat off which you fish yourself?

A. Outside of mackerel season, I have help then.

Q. You do have? A. Yes.

Q. How many?

A. One man besides myself.

Q. You have one man in addition that works with you during mackerel season? [3084]

A. Yes.

Q. What part of the year is that?

A. From September until December.

Q. Do you fish just market fish or cannery fish or both? A. Both.

Q. Can you give us any idea of what percentage of the time—I will withdraw that.

How much of the time each year do you spend fishing approximately?

A. About 10 months.

Q. And the other two months you spend working on your boat, is that right?

A. That's right.

Q. Now, of the 10 months, about how much time do you spend fishing market fish and how much time fishing cannery fish?

A. Well, there is about four months of fresh fish and about six months of cannery fish.

Q. Four months of fresh fish and six months

(Testimony of Walter B. McComas.)

cannery fish, about one and a half times as much spent on cannery fish as on fresh fish?

A. Just about.

Q. What portion of your income comes from fresh fish and what portion from cannery fish?

Mr. Dixon: Objected to as immaterial.

Q. Without giving the amount of your income, what portion?

Mr. Dixon: We still object as immaterial.

The Court: It is harmless to give some general idea. Objection overruled.

Q. (By Mr. Margolis): You may answer the question.

A. It is about three to one on cannery fish.

Q. You spend about one and a half times on cannery fish, but you get about three times as much money on the cannery, is that right?

A. That's right.

Mr. Dixon: If the Court please, I move that counsel's remarks be stricken and the jury instructed to disregard them.

The Court: It is just rephrasing the other. I can't see the materiality of it. It doesn't make any difference.

Q. (By Mr. Margolis): During the period you have fished from 1942 on what has been your home port?

A. Santa Monica.

Q. At all times?

A. That's right.

Q. Where have you delivered the fresh market fish that you have caught during that period?

A. To the Bay Fish Market.

(Testimony of Walter B. McComas.)

Q. Where is that? [3086] A. On the pier.

Q. On the pier at Santa Monica?

A. That's right.

Q. Have you delivered and sold all of your fish to the Bay Fish Market at Santa Monica?

A. That's right.

Q. I wonder if you would tell us—before that I will ask you this: Before you go out do you make any arrangements with Bayside Fish Market for what price you will get for your fish before you go out fishing? A. No.

Q. What happens when you come back with a load of fish?

A. I come in and unload, and they take it up and weigh it, and I go out and tie the boat up and come back and see what weight I have, and then collect my money.

Q. How much money do you collect? How do you know how much to collect?

A. Well, whatever the price is.

Q. Well, who tells you what the price is?

A. They do down there where I get my money.

Q. The Bayside Fish Market? A. Yes.

* * *

Q. (By Mr. Margolis): Let's get at it this way: Do you discuss the price with the Bayside Fish Market? A. No.

Q. What does happen?

A. He makes out the ticket and I take whatever he puts down on the ticket.

(Testimony of Walter B. McComas.)

Q. And that has happened always since 1942, is that right? A. Yes.

* * *

The Court * * * How many dealers are there at Santa Monica?

The Witness: Two.

The Court: What is the other one?

The Witness: Delucca.

The Court: Did you ever sell him any fish?

The Witness: No.

Q. (By Mr. Margolis): Has he ever bid for any of your fish? [3088] A. No.

Q. Have you ever seen the dealers out on the wharf bidding against each other? A. No.

The Court: Here is a question I would like to ask: Why do you fish at Santa Monica instead of Malibu or Point Mugu or San Pedro or somewhere else?

The Witness: Because my boat is there.

The Court: Because your boat is there?

The Witness: Yes.

The Court: It is convenient to your home?

The Witness: That's right.

The Court: I see.

Q. (By Mr. Margolis): There are a number of fishermen who fish out of Santa Monica, are there not? A. Yes.

Q. And there are others who have San Pedro as their home port, and others at Newport Beach, and so forth? A. That's right.

(Testimony of Walter B. McComas.)

Q. And you have arrangements there for a place to keep your boat?

A. I have my own mooring, yes.

Q. Those are arrangements a fisherman has to make when he has a boat, is that so?

A. That's right. [3089]

The Court: In other words, what I was getting at is a man chooses the place as a matter of choice. Either for his own convenience—You don't fish at Santa Monica because you like to fish mackerel or any particular kind of fish?

The Witness: No.

The Court: It is because it is convenient to your home and you have your boat there?

The Witness: Yes.

* * *

Q. (By Mr. Margolis): Mr. McComas, do you ice your fish?

A. I have an ice-box on, yes.

Q. On the boat, is that right?

A. That is right.

Q. Sometimes you are out several days, are you?

A. Three or four days at a time, maybe five days.

Q. And you ice your fish while you are out fishing?

A. That's right.

Q. Do you ever ice fish after you come in?

A. No.

Q. Why not? A. I haven't facilities.

Q. Are there any other reasons?

A. Well, it is really too much trouble to go to that to handle it. They wouldn't lift the fish up on the pier for you in the first place.

(Testimony of Walter B. McComas.)

Q. Who wouldn't lift the fish up on the pier?

A. The dealer there.

Q. It takes equipment to lift the fish up on the pier?

A. Oh, yes, it takes a hoist.

Q. Who does that equipment belong to?

A. It belongs to the fish dealer.

Q. They will lift it up for you when you sell it, is that right? [3091]

A. That is right.

Q. And not otherwise? A. No.

Mr. Margolis: Cross-examine.

The Court: Cross-examination?

Mr. Dixon: No, your Honor.

The Court: Step down.

(Witness excused.)

The Court: Next witness.

Mr. Margolis: Mr. Phelps.

ROBERT M. PHELPS

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Margolis:

Q. Your name is Robert M. Phelps, is that right? A. That is right.

Q. And you are one of the defendants in this case? A. Yes. [3092]

(Testimony of Robert M. Phelps.)

Q. What is your address?

A. 6257 Tipton Way in Los Angeles.

Q. Is that where you actually live?

A. I live on a boat I am fishing on most of the time.

Q. Do you have any other home of your own?

A. No. I don't.

Q. What is that address that you gave us?

A. That is my father's and mother's home.

Q. How long have you been a commercial fisherman—you are a commercial fisherman, aren't you?

A. That is what I do for a living.

Q. Do you do anything else for a living besides engaging in commercial fishing?

A. Occasionally a little bit of engine work, but not much.

Q. What do you mean by engine work?

A. Overhauling engines on other commercial boats.

Q. When you do that engine work you do that for somebody else and you get paid for that, is that right?

A. Yes, sometimes; sometimes just for free.

Q. When did you start fishing commercially?

A. In 1934.

Q. And at that time did you buy a boat?

A. Yes, I did. I bought a 28-foot jig boat.

Q. Is this a boat that was operated by a crew of one [3093] man or more than one man?

A. By a crew of one.

(Testimony of Robert M. Phelps.)

Q. You operated that boat and worked on it yourself? A. I did.

Q. You paid \$350 for that boat? A. Yes.

Q. You had it for how long? A. One year.

Q. Then you sold that boat, is that right?

A. That is right.

Q. For the same amount you paid for it?

A. Yes.

Q. Then after that did you go to sea for a few months?

A. Yes, I was back to sea. I went back as an engineer, marine engineer.

Q. You had been a seaman prior to the time you went fishing?

A. Yes, I had been a fireman and oiler and marine engineer up until that time.

Q. You went to sea then for a short time, is that right? A. Yes.

Q. And after that you came back and went back fishing and you have been fishing ever since, is that right?

A. That is right. I have made a few small trips on ships and I worked a very short time for the Bureau of Power [3094] and Light in Los Angeles on a frequency change.

Q. But most of the time since then you have been fishing? A. That is right.

Q. Did you fish for a while on other people's boats.

A. I have fished most of the time on other people's boats.

(Testimony of Robert M. Phelps.)

Q. On what sort of a basis?

A. Always a share basis.

Q. The same kind of a share basis that has been described here in the testimony, is that right?

A. That is right.

Q. And on boats in which you have no interest whatsoever?

A. Yes.

Q. Did you buy another boat in about 1940?

A. Yes, I bought another little 28-foot jig boat and I had it for about four months and I sold it.

Q. You paid \$650 for it, is that right?

A. Yes.

Q. Since then have you owned any boats?

A. No. I haven't.

Q. You don't own a boat now and you have no interest in any boat?

A. No, I don't.

Q. And you are earning your livelihood, your entire livelihood, from fishing on boats owned in total by other persons, is that right?

A. That is right.

Q. Do you have any of your own fishing gear?

A. At present I do have a little bit. I have three fish traps.

Q. You might explain what those are.

A. Those are a metal cage with funnels that go in and fish go in there and you catch them.

Q. What kind of fish do you catch in fish traps?

A. Well, these were to catch bass, rock bass.

Q. Did you have more gear than that previous to this?

A. At one time I had shark nets.

(Testimony of Robert M. Phelps.)

Q. What happened to that?

A. Well, they wore out and I didn't make enough to buy more so I don't have any more shark nets.

* * *

Q. When you were operating your own boat during the periods that you operated your own boat, did you fish market fish or cannery fish or both?

A. Both.

Q. And when you sold your cannery fish—incidentally, what is your home port?

A. Newport Beach now.

Q. It had been other ports?

A. San Pedro until the time the war started.

Q. And at the time the war started you and a lot of other fishermen shifted to Newport?

A. We went to Newport because the Coast Guard and Navy regulations were too strict to go in and out of San Pedro.

Q. And made fishing operations——

A. It made it practically impossible to fish there.

Q. So you have been at Newport ever since?

A. Yes.

Q. Now when you were fishing fresh market fish, did you sell your fish to the dealers when you had your own boat?

A. Yes, I did. [3097]

* * *

Q. Will you state how the price was determined for the fish which you sold?

A. Well, I don't know how it was determined. At the time I had the boats I took whatever they gave me.

(Testimony of Robert M. Phelps.)

Q. You just went in and took what they gave you? A. Yes.

Q. Did you ever get a different price from different dealers on the same day?

Mr. Rubin: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

I want to call counsel's attention to part of the memorandum of law that was handed to me yesterday.

Mr. Margolis: Memorandum of law, your Honor?

The Court: Yes, by the defendants.

Mr. Margolis: Yesterday?

The Court: Yesterday.

Mr. Kenny: I guess that was mine. [3098]

The Court: And three or four books.

Mr. Margolis: I thought that was several days ago.

The Court: "A co-operative endeavor which transgresses that line (that is, they talk about illicit practices) cannot justify itself by pointing to evils afflicting the industry or to a laudable purpose to remove them."

Mr. Margolis: If your Honor please, there was testimony about competition and price bidding.

The Court: We went all through that, counsel.

Mr. Margolis: We feel we should have a right to meet that testimony, your Honor.

The Court: The objection is sustained. You have had the right to meet it which the law allows you.

(Testimony of Robert M. Phelps.)

Q. (By Mr. Margolis): Did you ever ice fish and hold it when you had your own boat?

A. Yes.

Q. For how long?

A. Well, while I was out on a trip until I came in.

Q. Did you ever hold it after you came in?

A. No, you can't hold it.

Q. Why not?

A. Fish to be kept, you got to keep that at a certain temperature in a refrigeration box. You can't just throw ice on it and keep it forever. [3099]

Mr. Margolis: You may cross-examine.

Mr. Dixon: No questions.

The Court: Step down.

(Witness excused.)

The Court: Next witness.

Mr. Margolis: Mr. McLauchlan.

CHARLES McLAUHLAN

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name?

* * *

Direct Examination

By Mr. Margolis:

Q. Your name is Charles McLauchlan?

A. Correct.

(Testimony of Charles McLauchlan.)

Q. And you live in Santa Ana? A. Right.

Q. What is your occupation?

A. You mean now?

Q. Yes.

A. Mostly a defendant and partly I have a few bees. [3100]

* * *

Q. Have you been a fisherman in the past?

A. I have.

Q. Is that what you have done for a living?

A. True.

Q. When did you start fishing for a living?

A. In July of 1944. Before that I worked on a boat getting it ready to fish for about six weeks.

Q. But before you went to work on that boat in 1944 to get ready to fish, you had not fished commercially, is that right? A. That is right.

Q. And this was at Newport Beach, was it?

A. Correct.

Q. And during the time you fished, was Newport Beach your home port? A. That is right.

Q. Now what kind of a boat did you go to work on?

A. It is a 40-foot double ender, a jig boat and mackerel boat.

Q. What size crew does it have? A. Two.

Q. Yourself and one other?

A. The man who owned it.

Q. Did you own any interest in that boat on which you went to work? A. No, sir.

Q. You worked on the usual share basis, is that right? A. That is correct.

(Testimony of Charles McLauchlan.)

Q. How long did you work on that boat?

A. For about six months.

Q. Then what did you do?

A. Worked on other boats.

Q. All boats belonging to other people?

A. That is true.

Q. On a share basis? A. That is correct.

Q. How long did you continue working on other boats?

A. For about an additional year and three months.

Q. That was all the commercial fishing you had done? A. That is true.

Q. During the time that you have fished commercially, and as a matter of fact, at any other time, you have never owned a boat, is that right? [3102]

A. No, sir.

Q. You have never owned any interest in a fishing boat, is that right?

A. Well, I invested a lot of my time in getting a boat ready that was going to operate, but I didn't own any part of the boat because of the time I put in fixing it up.

Q. But you had no interest in the boat?

A. That's right.

Q. You merely worked on it with the owner getting it ready to go fishing, is that right?

A. Well, I worked on another boat getting it ready to go fishing myself, I was going to operate this boat myself alone, but I never owned any penny in it.

(Testimony of Charles McLauchlan.)

The Court: Let's see. The total length of time that you worked as a fisherman was approximately a year, is that right?

The Witness: A year and a half would be more correct.

The Court: All right.

Q. (By Mr. Margolis): At the end of that approximately year and a half of commercial fishing, what did you do?

A. I gave up the boat that I had just started to fish to become the business manager for the fishermen's union.

Q. At Newport Beach?

A. At Newport Beach.

Q. Is that the Newport Beach unit of Local 36, one of the defendants in this case?

A. That is true.

Q. And how long did you continue to hold that job?

The Court: When did you take it?

The Witness: September 23, 1945.

Q. (By Mr. Margolis): And how long did you continue to [3104] hold that job?

A. Until November 1, 1946.

Q. Since then have you had any connection with the fishermen's union aside from this case?

A. I have been a member. I am now the treasurer of the unit at Newport Beach.

Q. During the period that you were fishing did you fish cannery fish or fresh market fish, or both?

A. I fish cannery fish and fresh market fish both.

(Testimony of Charles McLauchlan.)

Q. About what proportions?

A. Well, that could be in terms of value or tonnage.

Q. Well, suppose you tell us how much time you spent fishing fresh market fish and how much time you spent fishing cannery fish?

A. I spent most of the time fishing cannery fish. I would say I spent three months fishing abalone, which are a market fish.

Q. And the rest of the time cannery fish?

A. The rest of the time albacore and mackerel, which are cannery fish.

Q. Before you started fishing you had been a shipyard worker, is that right?

A. That is true.

Q. You were active as an officer and member of the Local 36 at Newport Beach during the course of the strike in [3105] June of 1946, were you not?

A. I was the business manager.

Q. Were you active? A. That is true.

Q. You were the man who was generally in charge of the Newport unit, is that right?

A. Under the executive committee and under the strike committee.

Q. You say "under the executive committee"; you mean the over-all executive committee of Local 36?

A. Under that executive board made up of representatives from all the different units which meet in San Pedro. Also under the executive committee of the Newport Beach unit.

(Testimony of Charles McLauchlan.)

Q. I see. During the course of that strike in June of 1946 was there a system utilized in Newport Beach known as a clearance card system?

A. That is true.

Q. Will you tell us how that system worked?

A. Cards were printed of two colors. One of them was marked "Clearance Card"; the other one was marked "Registration Card." Those fishermen who wanted to co-operate in the activities of the strike came into the office and a card of each sort was filled out for each man. The registration card was kept in the file; the clearance card was kept by the man. The cards were numbered. The clearance card had around the [3106] rim dates, consecutive with the days of the month. From the time the man came in and registered, upon explanation of the way operations were conducted, he agreed, if he wished, to contribute a certain number of hours as a picket, and this would clear him for a certain number of days. And during these intervening days he would go fishing, and at the end of that period he would report and be assigned a post as a picket for another few hours. And this continued for the duration of the strike.

Q. Did all the boats which fished out of Newport Beach obtain clearance cards?

A. No, they did not.

Q. Were there boats that fished continuously during June of 1946 which did not obtain clearance cards?

A. That is correct.

Mr. Rubin: Does that refer to fresh market fish, counsel?

(Testimony of Charles McLauchlan.)

The Witness: That is true, fresh market fish.

Q. (By Mr. Margolis): Was any action taken by the union with respect to those boats which fished without obtaining clearance cards?

A. Yes, there was.

Q. Will you tell us what action was taken?

A. First of all we tried to find out which boats were in that category, and then the strike committee would send a couple of members of the union, or even non-members of the [3107] union who were interested in this activity, to explain to these non-co-operating boats what the issues were. And we would send one committee, and then we would send a different committee, who would explain to these people in question what the situation was in detail, and how they would benefit by the activities of the union in this situation.

Q. Any other action taken?

A. There was no action taken on the question of people who would not come in and register. We just tried to get their co-operation to come in and register.

Q. And you did get the co-operation of some, and of others you did not, is that right?

A. That is true.

Q. And this applies to all boats fishing fresh market fish?

A. That is true.

Q. Did you have a process or policy with regard to declaring boats unfair?

A. That is true.

Q. Will you explain what was done in that regard?

(Testimony of Charles McLauchlan.)

A. We declared boats unfair who continually would go past the picket boats to sell fish. We would declare them unfair after we had sent two or three committees, as the case might be, or if they were hard to find maybe we would only succeed in having one committee reach them and talk with them, and if the committee was unable to, by explanation, show them that their interests lay with the majority, then the committee would come back to the strike committee and report in detail the attitude of these non-co-operators. And sometimes we would declare such a boat unfair; other times we would withhold action until a further committee had seen them.

Q. Do I understand that during the period of the strike fish was being delivered to dealers whose places were being picketed? A. That is true.

Mr. Rubin: That is objected to as calling for a conclusion of the witness and ambiguous as to what dealers. There are several dealers there.

The Court: The objection is overruled. You can clear that up on cross-examination.

Q. (By Mr. Margolis): What dealers were those that were being picketed?

A. The dealers being picketed were the Harmon Fish Company—J. P. Harmon Fish Company, and the Bayside Fish Company.

Q. And those are the companies you referred to in your answer a moment ago?

A. That is right.

* * *

(Testimony of Charles McLauchlan.)

Q. (By Mr. Margolis): How many were there in June of 1946, in the event there has been any change?

A. There were five major dealers, and there were one or two people who, although retailers, bought a little fish from fishermen.

Q. With respect to the boats that were declared unfair, that was simply a motion that was passed saying that the boats were unfair, is that right?

A. That is true.

Q. What was done, if anything, pursuant to that motion declaring the boats unfair?

A. There was considerable discussion of this question, and it was the decision of the strike committee, and we finally took it to the membership, and the membership agreed that any boat that was declared unfair, after being visited by his friends, a committee from the union composed of his friends, people who knew him very well, that if such a boat then did not co-operate he should not be treated any longer as a friend.

Q. What do you mean by that?

A. It is one of the customs in the fishing fleet for the exchange of information about fishing.

Q. Where the fish are found?

A. Where the fish are being caught at that particular [3110] time, and what gear is most successful, and which way the fish are moving, and so forth. So the fishermen agreed not to give any of this information to those who did not co-operate with all the fishermen.

(Testimony of Charles McLauchlan.)

Q. Was there any other action taken in addition to that?

A. Further, that we should have no truck with such people, that is, that we would cut them dead, as you might say; not even see them on the street.

Q. Anything else besides that, or is that all?

A. I believe that is all.

Q. Were you in the court room when Mr. Irvan D. Anderson testified? A. I was.

Q. You heard his testimony? A. Yes.

Q. Do you know Mr. Anderson? A. I do.

Q. How long have you known him?

A. Well, somewhat a shorter time than I have been fishing. I would say a couple of years.

Q. Were you friendly with him?

A. Not unfriendly. I would say I don't know him well enough to be a friend.

Q. An acquaintance? [3111]

A. An acquaintance, yes.

Q. Did you ever have any conversation with him about joining the union or payment of dues?

A. Yes, sir, I did.

Q. When did that conversation take place?

A. Well, several times. At different times, usually when the bait boat upon which he works was tying up and the men were coming ashore, and the conversation was with the crew. Very seldom with one man.

Q. In other words, it was with him as a member of a group, is that right? A. That is right.

(Testimony of Charles McLauchlan.)

Q. And in which you talked and he and other members of the group talked, is that right?

A. That is right. It may be that once maybe I engaged him in conversation and the others went away and we were left talking.

Q. That may have happened on one occasion?

A. Yes.

Q. Over what period and about how many of these conversations were there?

A. Between three and six times.

Q. Over what period of time?

A. Over a period of a year, roughly.

Q. Were these conversations all pretty much the same or were they different from time to time?

A. Well, they were progressive. I mean, there would be different discussions, different points brought up at each one, but they were in general about the union and the attitude of individuals toward the union, fishermen toward the union, bait haulers, who are a particular kind of fisherman, toward the union.

Q. Will you tell us what the substance of these conversations was?

A. Oh, the substance of the conversations on both sides would be summarized in this way:

The men on the crew were of different opinions. Some of them agreed that unions in general were good. In fact, Mr. Andersen himself was a member of a union, and although he had had some rather bad experiences, in general his experience with his

(Testimony of Charles McLauchlan.)

previous had been good. "But," he said, "how will the union help me as a fisherman?" And I would explain.

For instance, the bait haulers, they are specialists, they haul with a net anchovies and sardines. The anchovies and sardines for a period of four months are sold as bait and ground and resold by the canneries to the mackerel fishermen. [3113]

* * *

Mr. Rubin: This is a conversation?

The Witness: This is the substance of the conversation.

So then the bait haulers, they get a certain price for their fish and they sell to the cannery which, in turn, grinds it and resells it to another kind of fisherman.

Now by understanding with the cannery over a period of time the fishermen's union has reached this understanding——

* * *

So the union in its contract on the mackerel price and conditions of the delivery of mackerel, stipulates that the bait crews shall receive for the bait they catch the same price as the contract calls for the delivery of mackerel. So what happens to the bait haulers depends upon what happens to the mackerel fishermen, and that is part of the conversation that I had with the bait haulers.

Some of them were of this opinion, well——

The Court: You mean they stated that to you?

The Witness: They stated it to me; yes, sir.

(Testimony of Charles McLauchlan.)

The Court: Did Mr. Andersen state it to you?

The Witness: He especially state it to me.

The Court: That is what the question is about.

The Witness: He especially stated to me, "Well, that is fine, we are sure now that we are going to get this price for [3115] our bait, that is lovely, but why should I pay any dues to the union."

* * *

The Court: This is another conversation?

The Witness: I say there were, according to my previous testimony, probably three conversations. Now it is hard for me to say that all of these things were said at any one, but to my recollection these conversations carried about the same [3116] content, you see, and I was saying the same thing to Mr. Andersen two or three times to try and convince him. So this was the trend then of the argument back and forth.

I was saying to Mr. Andersen, "You should be in the union which has, before you came fishing, benefited you and which all the time you have fished is benefiting you. You should be a part of this organization and help to pay hall rent and electric bills and keep the necessary personnel on the docks to sell you shotgun shells when you need them and to issue cards telling you when there is a meeting so you can come and express yourself and be part of this organization and run this organization."

And his conversation was to the degree, "Well, I am very busy, I work on this boat 20 hours a day.

(Testimony of Charles McLauchlan.)

When we finally get the bait in then the net is broken down and we have to repair the net. And in the season when we do get the fish I have just time enough to sleep, and if the fish are hard to find we might run and make five or six (what we call dry hauls; that is we put the net out and the fish get away because the water is too deep) and we haul the net back in——”

Mr. Dixon: If the Court please, are we to understand that this is still part of this conversation?

The Witness: That is correct.

The Court: I understand it is.

Mr. Dixon: All right. [3117]

The Witness: So he says, “Anytime that I would be able to come to a meeting, it would be at the expense of my sleep.”

And I would say, “The union does not demand that you come to a meeting, we do not have any fine that says if you don’t come to a meeting it costs you an extra dollar. We are a democratic group and we just urge you to come.”

I said, “We even will try to have a special meeting on a time when there isn’t any bait or when you are tied up for a while so you can come and be part of this democratic operation.”

And Mr. Anderson said, “Well, this is considerable trouble. I am very happy to accept the price of fish and I wish you the best of luck but,” he says, “I don’t care to pay any dues and I don’t want to come to any meetings.”

(Testimony of Charles McLauchlan.)

And I would keep trying, and I would keep trying. I would go to this boat as it came in, and I would maybe—— [3118]

* * *

Q. Did he ever join the union?

A. He never joined the union.

* * *

Q. Did he do anything else in connection with the union? A. Well, I would say yes.

Q. What did he do?

A. Now I don't know whether it was, whether he wanted to do it, but he did two things: In the spring of last year there was an attempt to limit the size of bait nets, and this was a well organized campaign in the state legislature, and when we heard about it all the bait haulers were up in arms——

Mr. Rubin: We don't see any materiality to this at all, your Honor. We object to it on the ground it is immaterial.

The Witness: Mr. Andersen contributed——

Mr. Rubin: Just a moment. Your Honor, we object on the ground it is incompetent, irrelevant and immaterial.

The Court: Yes, I think you had better get back to the traditional method of trying lawsuits by question and answer.

Mr. Margolis: This is preliminary.

Q. Did the union take some action in connection with pending legislation concerning the size of bait nets? A. Yes, sir.

(Testimony of Charles McLauchlan.)

Mr. Rubin: That is objected to as incompetent, irrelevant and immaterial.

The Court: Objection sustained. [3119]

* * *

Q. Mr. McLauchlan, have you ever worked on a boat operated by Mr. Naylor? A. Yes.

Q. By the way, that is the Mr. Naylor who testified here?

A. That is true. He is the owner of the Bayside Fish Market.

Q. When did you work on this boat operated by Mr. Naylor?

A. That was from about the middle of December 1944 to about the middle of February 1945.

Q. What was the name of the boat?

A. It had no name.

Q. No name.

A. It had a number, which I do not remember.

Q. How big a boat was it?

A. It was about 40 feet long.

Q. How large a crew?

A. It had a crew of three.

Q. Including yourself?

A. Including myself.

Q. You had no interest in that boat?

A. No interest.

Q. What kind of fish did the boat go after?

A. Sharks.

Q. Exclusively?

A. At the time I was fishing the boat.

Q. What was done with the shark that was caught by that boat?

(Testimony of Charles McLauchlan.)

A. The shark and the liver were sold—the shark itself was sold to Mr. Naylor and the liver were sold through Mr. Naylor.

Q. All of them? A. All of them.

Q. Any shark or liver offered to anybody else?

A. No.

Q. Did Mr. Naylor get a share, some share of the proceeds in connection with his ownership of the boat, or operation of the boat?

A. That is true. [3121]

Q. In addition to fishing, using the boat for fishing, did you and other members of the crew do any work on the boat or other equipment?

A. On the gear.

Q. You mean on the nets?

A. On the nets.

Q. What did you do in connection with the nets?

A. Well, as we used the nets they would gradually become somewhat slimy and some of them were new and some were not. The ones that were not new would be torn in places. So when we came in with a load of fish we would tie the boat up, we would unload the nets, put them out on the drying rack, we would take them from the drying rack to where we would mend them to the tank vat where they would be tanned by soaking in this boiling solution of tanning, which is oak bark and water, for a period of time. Then they would be taken out of the tan vat onto the boat and we would go fishing again.

Q. As I understand your testimony, with regard to June of 1946 there was fishing conducted during that month? A. There was.

(Testimony of Charles McLauchlan.)

Q. How did the amount of fish that came in during the month of June 1946 compare with other months when you were present?

Mr. Rubin: Just a moment. That is objected to as calling for a conclusion and not the best evidence. [3122]

The Court: Well, if he knows he can answer.

The Witness: There was more fish in Newport harbor during the month of June, during the strike period, than there has been since or before.

Q. (By Mr. Margolis): At any time that you know about, is that right?

A. That is true. And it all sold at a good price.

Mr. Rubin: Now, if your Honor please, we submit that that last answer is not responsive.

The Court: That is not responsive. It may be stricken.

Mr. Margolis: We would like to have this document marked for identification.

The Clerk: HH.

(The document referred to was marked Defendants' Exhibit HH for identification.)

Q. (By Mr. Margolis): Mr. McLauchlan, I show you a document that has been marked Defendants' Exhibit HH purporting to be the strike committee minutes for June 12—that is June 12, 1946, is it not?

A. Yes.

* * *

Mr. Margolis: If your Honor please, at this time we offer Defendants' Exhibit HH, for identification, in evidence.

* * *

(Testimony of Charles McLauchlan.)

The Court: Very well. Admitted in evidence.

(The document referred to was marked Defendants' Exhibit HH, and was received in evidence.)

Mr. Margolis: Ladies and gentlemen of the jury, I would like to read to you the minutes, at least a portion of them, the whole minutes will be available to you, however.

(Whereupon counsel read to the jury from Defendants' [3124] Exhibit HH.)

Q. (By Mr. Margolis): Incidentally, what is the Souder boat that is referred to in these minutes?

A. It is the boat owned by—well, I am not sure of the ownership, but it is the boat operated by the man Morris Souder who testified here in behalf of the prosecution.

Q. And is that a bait boat?

A. It is a small boat which can be used for bait fishing.

Q. Was it doing bait fishing at that time, do you know?

A. At that time I don't know. When I say "bait fishing" I mean the catching of certain species of tuna, and so forth, with bait and hook and line.

Q. Do you know whether it caught bait?

A. No. it didn't catch bait.

Mr. Rubin: There are two more sentences, Mr. Margolis. If you don't want to read them I will read them at this time.

(Testimony of Charles McLauchlan.)

Mr. Margolis: I will read them. "Discussion on who is on the putrid list and how to contact those persons."

Mr. Rubin: On the first page "Phelps reports that as Picket Captain we are better set up now than ever before and our picket lines are full for several days ahead."

That makes the whole minutes.

* * *

Mr. Margolis: If your Honor please, at this time we would like to offer a part of an exhibit that we didn't have an opportunity to read that wasn't offered. Government's Exhibit 301, a portion on page 1 which was not part of the government's offer.

* * *

The Clerk: II. [3126

(The document referred to was marked Defendants' Exhibit II, and was received in evidence.)

* * *

So you will know what I am reading from, this is a regular meeting of Newport fishermen, May 20, 1946.

(Whereupon counsel read to the jury from Defendants' Exhibit II.)

Q. (By Mr. Margolis): Mr. McLauchlan, with reference to this reading of a letter from the Technical Fisheries on the shark question, do you recall what that pertained to?

(Testimony of Charles McLauchlan.)

A. At that time the shark fishermen were having a great deal of trouble, because the dealers had dropped the price from 15 cents a pound to two or three cents a pound. [3127]

* * *

Q. (By Mr. Margolis): Was the union engaged in any activities at this time in connection with the Technical Fisheries and the shark question?

A. That is true.

Q. What sort of activities? What was the union doing?

A. The union was trying to help its members who fished shark to find some way of getting a little more money and not to be wasting the carcasses of the shark. [3128]

Q. Was it trying to find additional outlets for the shark? A. That is it.

Q. What was this Technical Fisheries operation that I referred to?

A. They were a concern in San Francisco who had experience during the war in the salt during curing of various fish that hadn't usually been treaded in that manner before.

Q. And they were experimenting in a new operation at that time, is that right?

A. They had been experimenting, and we thought they might give us some leads for more utilization of fish products.

Q. I want to direct your attention to Government's Exhibit 302, which is a copy of the Newport Beach minutes or the original of the Newport Beach

(Testimony of Charles McLauchlan.)

minutes for special meeting, Fishermen's Union, Local 36, May 27, 1946, and particularly to the portion reading as follows: "Question by Mills of how our strike will coincide with the surplus of northern fish." Does this state accurately everything that was said on that particular subject referred to?

Mr. Dixon: If the court please, it doesn't refer to anything this particular witness said, and these are the minutes of his own organization. I think since it is not attacking anything that he said that would be a violation of the general rule. [3129]

The Court: Read your sentence again, will you please?

Mr. Margolis: "Question by Mills of how our strike will coincide with the surplus of northern fish."

The Court: Your question is?

Mr. Margolis: I don't know whether my first question was answered, whether this represents accurately everything that was said on this subject.

Mr. Dixon: We object to it on the grounds already given, your Honor.

The Court: The objection is overruled. You may answer it yes or no.

The Witness: No.

Q. (By Mr. Margolis): Will you tell us what was said on that subject?

A. Considerable was said.

Q. Give us as brief a summary of what was said as is possible and yet cover it.

(Testimony of Charles McLauchlan.)

A. Well, Mr. Mills explained that there was a great, in fact, the largest cold storage holdings of what are called rock fish filets in history.

Q. That is a fresh market fish?

A. That is a fresh market fish that is caught in great quantities in northern California and Oregon by members of the International Fishermen & Allied Workers of America. And that this quantity——

* * *

And that because of this terrific holding the price was quite low, and because of the low price the fish, even after paying transportation charges, could be delivered in the Los [3131] Angeles area and sold at prices very low in comparison even to local fish.

And his question was as to what good would it do us to withhold our production trying to get better wages and at the same time the market would be filled with this fish from the north.

The Court: Did he say "wages" or "prices"?

The Witness: I think he said "wages."

The Court: Are you sure of that?

The Witness: I said I think so. I am not sure.

The Court: Your are not sure?

The Witness: No.

* * *

Q. Now I want to direct your attention to the same minutes, page 2, about two-thirds of the way down the page, "McLauchlan says coercion, yes, but that type of action is what shows we are growing up into a unified union of coastwise fishermen and

(Testimony of Charles McLauchlan.)

not a little Local 36. We are in an emergency and we should follow our executive board recommendation."

Now will you state whether or not that correctly and fully sets forth the substance of what you said on that subject at that time?

A. The words as written here, I would say, give a considerably different impression.

The Court: Did you write them?

The Witness: I did not write these words.

The Court: Are those your minutes?

The Witness: I made the talk that is written in the minutes.

The Court: All right.

The Witness: They give a considerably different impressions than what I said.

Q. (By Mr. Margolis): Will you tell us what you said?

Mr. Rubin: That is objected to as varying the terms of a written instrument.

If your Honor please, yesterday in discussing this—I am not going to argue the other question, except to say there is a difference between a confession which may be controverted and an admission against interest which may not be varied.

The Court: Admissions against interest, they can explain, they can deny that they said it. The objection is overruled. It is for the jury to determine which statement is accurate.

The Witness: It is all right to answer?

The Court: Yes.

(Testimony of Charles McLauchlan.)

The Witness: This meeting followed a meeting which had been held in San Pedro.

Mr. Dixon: Now, if the Court please, I ask that the witness be instructed in the interests of expediting the matter to state just what he said.

The Court: That is right. Answer the question.

The Witness: Okay.

That is what I was explaining to the membership, that in the meeting in San Pedro we had discussed this thing very thoroughly and we had realized that in any democratic organization you would never get unanimity, that there would always be at least one person who would have a different opinion, and that there might be as much as—well, we will say, even 40 per cent might have a different opinion—but I explained how, when we have an election for president of the United States, if the Democrats win why this president is the president of the Republicans who lost just the same, and that you might call it coercion for the Republicans to have a Democratic president and to be bound by his executive decisions, but that was part of the democratic process, and that we as fishermen and in our fishermen's union had just as much right to use this tried process of democracy as the people of the United States; that it was part of our democratic traditions that the minority should be bound by the decisions fairly arrived at of the majority.

Mr. Rubin: Now, we move to strike that as self-serving.

(Testimony of Charles McLauchlan.)

The Court: The motion is denied. It is admitted on the ground, as I heretofore indicated, that it was part of the statement.

Mr. Margolis: Your Honor please, with respect to Government's Exhibit 303 we offer the omitted portions, the portions omitted by the Government in its offer, which appears at the top of page 2 and at the top of page 3 thereof.

(The document referred to was passed to the Court.) [3135]

* * *

The Court: It may be admitted.

The Clerk: JJ.

(The portion of the document referred to was received in evidence and marked Defendants' Exhibit JJ.)

Mr. Margolis: Ladies and gentlemen, I want to read to you from what was Government's Exhibit 303 and which is now Defendants' Exhibit JJ in part, which are the minutes of a special meeting of the fishermen of Local 36, May 29, 1946. This is the Newport local.

(At this point counsel read Defendants' Exhibit JJ to the jury.)

Q. (By Mr. Margolis): Referring to the same minutes from which I have just read, Mr. McLauchlan, I want to direct your attention to a portion on page 2 which reads, "He explained John Horman's stand and why John did not sign." Is

(Testimony of Charles McLauchlan.)

that what was said at the meeting or is that simply a reference to the subject of what was said? [3136]

A. Well, it is not what was said.

Q. Will you tell us what was said?

Mr. Rubin: Same objection as heretofore made, if your Honor please. This doesn't state anything. This doesn't state who said what. It says he explained John Horman's stand. In the first place, is is a conclusion. There is nothing here for anybody to deny.

Mr. Margolis: The conclusions are admitted against us, your Honor.

The Court: He explained John Horman's stand? There isn't anything in the record about what John Horman's stand is. The objection is sustained.

Mr. Margolis. We ought to be able to show what it is.

The Court: It does not say whether it is good or bad. The objection is sustained. There is no harm done to anybody.

Mr. Margolis: It does appear from the minutes who said this.

The Court: The objection is sustained, counsel.

Mr. Margolis: May I have Exhibit 328?

(The document referred to was passed to counsel.)

Q. (By Mr. Margolis): I want to direct your attention to Government's Exhibit 328, which are the strike committee meeting minutes of Newport of June 4, 1946, and particularly to that portion read-

(Testimony of Charles McLauchlan.)

ing, "Moved, seconded that every man that [3138] belongs to this union must stand on the picket line. Carried. Discussion on penalty for men who do not stand picket line decided the strongest penalty would be to declare the man unfair." Now I want to ask you whether or not at any time during the strike any stronger penalty was imposed upon anyone than declaring the man unfair for any activity in connection with the strike. A. Never.

Q. And you have already told us what it meant to be declared "unfair," is that right?

A. That's right.

Q. I also would like to direct your attention to this portion: "C-o-m," I guess that stands for committee? A. Yes.

Q. "Committee for distribution of letters along highway 101. Duty: Contact boat, give letter, write down the boat's name and number, explain the union's problems, the betterment of the whole industry. To be taken up later." Would you explain what is referred to by "Highway 101" there?

A. That is a stretch of highway bordering on Newport Harbor along which are a number of boat slips and a little repair yards where fish boats tie up.

Q. And this referred to that portion of 101, is that right? A. That is right.

Q. And was this action of contacting the boat, explain the union's problem, the betterment of the whole industry, and so forth, the action that was followed out? A. That is right.

(Testimony of Charles McLauchlan.)

Q. I want to call your attention to page 2 of the same exhibit, the portion reading: "Moved, seconded that suitable cards be made to be handed persons who cross the picket line. Carried." Would you explain what, if anything, was done with [3139] reference to that motion?

A. Well, these cards were mimeographed, and—do you want the idea?

Q. Do you have any of those cards or were they distributed out at that time?

A. I think they were all distributed.

Q. What was the substance of what the cards said?

A. The substance was that the fishermen wanted to know when they went fishing how much they were going to get for their fish when they landed it. They wanted to know before they went fishing. And in order to do this we had to have it in a contractual relation with—

The Court: Is this what was said on the card?

The Witness: That's right. [3140]

* * *

Q. What was done with those cards?

A. That we wanted the co-operation of the public.

Q. What was done with the cards?

A. The procedure was as follows: each picket had a few of these cards, and if the words on his banner did not dissuade people from going in, then when the people came out he would hand them this card. [3141]

* * *

(Testimony of Charles McLauchlan.)

Mr. Margolis: Your Honor please, at this time we would like to offer the omitted portion on page 1 of Government's Exhibit 310.

The Court: You do not want the other part?

Mr. Margolis: I am not necessarily offering it.

The Court: Very well. Admitted.

The Clerk: KK.

(The document referred to was received in evidence and marked Defendants' Exhibit KK.)

Mr. Margolis: Ladies and gentlemen of the jury, I want to read to you from what has been Government's Exhibit 310, the portion which is now admitted in evidence as Defendants' Exhibit KK, which is the strike committee meeting at Newport Beach, Thursday, June 6, 1946. I believe the [3142] rest of the exhibit has been read to you so I will just read the omitted portion.

(At this point counsel read Defendants' Exhibit KK to the jury.)

Direct Examination

(Continued)

By Mr. Margolis:

Q. Mr. McLauchlan, are those letters to which you testified asking for the support of these people on strike?

The Witness: Well, I am trying to remember. I am not just sure whether they were the [3143] same or a different letter because the previous reference——

(Testimony of Charles McLauchlan.)

Q. What is your best recollection as to what that refers to?

A. It was a letter mailed to all the members on the boats in Newport Beach, some of which at that particular time of the year had not yet started to fish, and we wanted to contact every member——

The Court: No. What did the letter say? [3144]
That latter may be stricken. What did the letter say?

The Witness: It said in general——

The Court: The same thing you have heretofore described?

The Witness: I think that must be true.

The Court: Very well.

Q. (By Mr. Margolis): Now I want to direct your attention to Government's Exhibit 311, which is a set of minutes dated June 7, 1946. These are Newport Beach minutes, are they not?

A. Yes.

Q. And particularly to that portion on page 1, "Moved and seconded that a committee of three men contact all men who are unfair before final action. Carried." I want to ask you whether the final action that is referred to there is again the final action of declaring them unfair. [3145]

* * *

Q. (By Mr. Margolis): What final action is referred to?

A. Was to declare by a vote of the membership that these particular individuals were considered unfair by the union. And until that was done——

(Testimony of Charles McLauchlan.)

The Court: Well, is that the final action?

The Witness: Yes.

The Court: All right. You have answered it.

Q. (By Mr. Margolis): Were they officially considered unfair, regardless of whether their actions were unfair, before they were put on the unfair list?

A. No, that is the main point. [3147]

Q. I want to direct your attention now, Mr. McLauchlan, to Government's Exhibit 312, being the strike committee minutes for Newport Beach of June 8, 1946, and particularly to that portion on page 2 reading: "Publicity committee report none. Moved, seconded that the publicity committee draw up another letter or circular for the press, public, and information and businessmen——"

Mr. Rubin: I think that is "unfair" instead of "information," counsel, if I may interpolate.

Mr. Margolis: That is right.

Q. (Continuing) "Moved, seconded that the publicity committee draw up another letter or circular for the press, public, and unfair markets and businessmen in Newport." I think this says "Carried," is that right? A. Carried, yes.

Q. I want to ask you if you have a publicity committee which functioned all through the month of June, 1946. A. That's true.

Q. What functions did that publicity committee carry on?

A. This sort of thing that is in this paragraph. That is, giving information to the press, to the pub-

(Testimony of Charles McLauchlan.)

lic, to any section of the public, including businessmen in the town, people dependent upon the fishing fleet and its welfare and so forth. [3148]

Q. Concerning what?

A. Concerning the situation that brought about the strike. And the attitude and desires and needs of the union.

Q. Did you give publicity concerning the strike itself and the actions you were taking?

A. That's right.

The Court: This said, "Unfair businessmen?"

The Witness: Unfair markets.

Mr. Margolis: Unfair markets.

The Court: Unfair markets and businessmen.

The Witness: That didn't mean unfair businessmen, because no businessmen were unfair.

Q. (By Mr. Margolis): I want to refer to page 3 of the same set of minutes. "Motion moved, seconded, that picket line be streamlined in the case of albacore and that hired pickets or volunteers be used. This motion is a recommendation. Carried." I want to ask you what was the situation during the month of June, 1946 with regard to albacore fishing?

A. The albacore started to get on the lines about a month early.

Q. What do you mean by "get on the lines?"

A. Well, it has always been the practice of the fishermen along about when they think albacore are going to start to hit, to go out on prospecting trips, you might say—well, here some people

(Testimony of Charles McLauchlan.)

just happened to be out a way early and they [3149] began to catch albacore.

Q. Came in about a month early and what happened with regard to what the fishermen did at that time?

A. The albacore are the main resource of the small boat fleet, and when the albacore hit nothing can hold them, nothing can hold the fishermen, they go albacore fishing, even if their boats aren't finished they go albacore fishing.

Q. Is that what happened during the month of June?

A. That's right. [3150]

* * *

Q. (By Mr. Margolis): I show you a one-page mimeographed sheet, mimeographed on both sides and addressed on one side "To the Public" and purporting to bear the signature of Charles McLauchlan, business manager, IFAWA, Local 36, Newport Unit, and ask you whether you recognize that.

A. I do.

Q. What is that?

A. This is the letter mentioned in the minutes which was duly drawn up and mimeographed by the publicity committee.

Q. The one that you mentioned previously in your testimony?

A. Yes, sir.

The Court: This morning? The one that was handed to people who went through the lines, or the one that was sent to the small boat owners?

The Witness: This is the one that was, according to the testimony just now, just finished, the

(Testimony of Charles McLauchlan.)

minutes about the publicity committee shall draw up a letter to the public, unfair markets and businessmen.

Mr. Margolis: I ask that this be marked for identification and then I will offer it in evidence, your Honor. The Clerk: LL.

(The document referred to was marked Defendants' Exhibit LL for identification.) [3151]

Mr. Rubin: Usual objection, that it is self-serving, your Honor.

The Court: Let me see the minutes that this refers to.

(The document referred to was passed to the Court.)

The Court: What is your objection?

Mr. Rubin: The objection was that it is self-serving, if your Honor please.

The Court: Well, I think that it is admissible as explanatory of the document that is now in evidence. Objection overruled.

(The document referred to was received in evidence and marked Defendant's Exhibit LL.)

Mr. Margolis: This exhibit which has been marked LL is a mimeographed sheet, mimeographed on both sides, which reads as follows:

(At this point counsel read Defendants' Exhibit LL to the jury.)

Q. (By Mr. Margolis): Just a brief reference to Government's Exhibit 313, Mr. McLauchlan,

(Testimony of Charles McLauchlan.)

which is the strike committee meeting dated June 11, 1946, the portion which is in evidence as Defendants' Exhibit T, "Discussion and reading of the proposal tentatively accepted by the San Pedro dealers. General discussion on the merits of the proposal." I want to ask you whether or not that refers to the letter of June 11, 1946 addressed [3152] to the fresh fish dealers of the port of San Pedro which is in the evidence as Defendants' Exhibit A.

A. It does.

Q. Now I want to direct your attention to Government's Exhibit 317, which are the minutes of June 20, 1946 for Newport Beach, and particularly to that portion on page 1 of that exhibit which reads, "Assigning men as patrolmen. Very good results being obtained." Was there a difference between pickets and patrolmen?

A. Yes, there was.

Q. Will you explain what the difference was, what a patrolman did?

A. Well, the patrolmen were our emissaries to fishermen who had not yet come into the office and been registered. The patrolmen were assigned for certain hours, maybe three hours, instead of picket duty, to go to a certain section of the bay and to talk to the fishermen that they found working on their boats or tying up or cleaning up their boats, and explaining to them the issues in the strike and asking them for their cooperation, and if they agreed to cooperate to come over and register with the strike committee.

(Testimony of Charles McLauchlan.)

Q. And that was referred to in those minutes as patrolmen? A. That is correct. [3153]

* * *

Q. (By Mr. Margolis): Now, I will direct your attention to page 3, near the top of the page, of these minutes, where it says, "Report on Mooring Committee"—incidentally, these are the minutes, are they not, of June 24, 1946 for the Newport Beach unit?

* * *

A. Yes, these are the minutes.

* * *

Q. (By Mr. Margolis): "Buckman gave his report. Says the city has received permission for the mooring basin proposed off of 19th Street. Said city engineer wanted some technical data on how to moor boats. McLauchlan gave his report. Said they looked around and found several places that may do temporarily, but problems came up that were insurmountable. We may notify harbormaster of moorings available by owners' absences." Does that set forth completely the substance of what was said in that report?

A. As it is written it is not understandable in certain parts. [3155]

Q. Will you tell us what was said on that subject?

* * *

A. We had a lot of trouble in the Newport Harbor trying to find a place to moor the boats of the fishermen, and one of the things we tried to do, to

(Testimony of Charles McLauchlan.)

sort of alleviate this somewhat, was to find, if possible, areas that were suitable for mooring areas which were not being used. So looking at a chart of the harbor we saw several such corners, and I had the job of going to see city officials and property owners, or whatever, to see if there was a possibility of their being used by fishing boats. And it says here that problems came up which were insurmountable. These insurmountable problems were the fact that the property owners didn't want fishing boats around. They wanted these beautiful yachts with nice painted hulls and flapping sails, but a working boat for a man and his family to make a living, they didn't want to have around.

Mr. Rubin: If your Honor please, we are [3156] in another speech again, and we submit it should be stricken.

The Court: Yes, it is wholly immaterial.

The Witness: This is what I said in my report.

Mr. Rubin: Even if he said it it is immaterial.

The Court: It is immaterial.

Mr. Margolis: The government offered a lot of immaterial evidence, and if——

The Court: Certainly a lot of immaterial evidence has gotten into this record, and it is my fault. I should have been a little firmer and tougher at the beginning than I have been. However, that is immaterial. The jury is instructed to disregard it. It is stricken from the record.

Q. (By Mr. Margolis): I want to refer to Government's Exhibit 320, which is the strike committee minutes for June 28, 1946 in Newport Beach,

(Testimony of Charles McLauchlan.)

and the portion on page 1 which reads "Passed out circular to all sport fisherman companies,"—is that what it says? A. Yes, that is what it says.

Q. "Passed out circular to all sport fisherman companies. Had good reception." Will you look at those minutes in order to refresh your recollection, and tell us if you know what that referred to?

A. Yes, this is the reference—in the mackerel fleet and belonging to the union we have a number of fishermen, especially during the spring [3157] and summer months, who work on what is known as sport fishing boats.

Q. What are these sport fishing boats?

A. The sport fishing boats take out people for fun, they charge them so much a day, and they go out here and there with a group of from ten to forty amateurs, you might say, amateur fishermen. Others charter the boat, may a group of five charters a boat and goes out and spends the day. Those are the two types. The crews on these sport fishermen operate the engines and care for the welfare of the passengers and navigate the boat, and I think they cook for the passengers and clean the fish and so forth. So these men who are the summertime crews on sport fishing boats fish mackerel in the winter, and we wanted their co-operation to explain to all the people who go out on the sport fishing boats what we were after.

Q. Incidentally, is it the practice for any of this fish which is caught on the sport fishermen boat or sport fishing boat to be sold to the fresh market dealers?

(Testimony of Charles McLauchlan.)

A. That has happened many times, and that was another point in the co-operation— [3158]

* * *

Mr. Margolis: If your Honor please, I would like to offer in evidence the omitted portion of this exhibit, that is, Exhibit 320, which is on page 2 thereof.

* * *

The Court: I do not know that it would raise collateral issues. From reading it, it looks like it ties into the same general situation. The motion is denied. It is admitted in evidence.

The Clerk: MM.

(The document referred to was received in evidence and marked Defendants' Exhibit MM.)

Mr. Margolis: Ladies and gentlemen of the jury, this is the strike committee meeting minutes of Newport Beach, June 28, 1946, originally offered by the Government as Exhibit 320 and the portion now offered by the defendants is MM and reads as follows:

(At this point counsel read Defendants' Exhibit MM to the jury.)

Q. (By Mr. Margolis): Do you know who is referred to there? [3160]

* * *

A. That is right.

(Testimony of Charles McLauchlan.)

Q. This Mr. Negri was the owner of a boat?

A. He was a man who leased a barge, or chartered a barge.

Q. What did that barge do?

A. That barge as towed into Mexican waters about two days' or three days' journey down, it was anchored there with ice aboard, other boats journeyed from San Diego down and back carrying to the barge ice, supplies, gasoline, and carrying back albacore which were purchased on the barge from small boat fishermen whose home port was San Diego, that is, who cleared out of San Diego, and who hoped to stay in the vicinity of the barge all season without coming back, the long voyage each time they caught a hold full of fish.

Q. Now do you recall this discussion at the meeting of June 28, 1946 with regard to putting a weighmaster, a CIO weighmaster, on the Victor Negri barge?

A. I do.

Q. And was a CIO weighmaster later to be put on the barge?

A. He was.

Q. Do you know what the function of that weighmaster was?

A. The function of the weighmaster was to watch the scales and to see that fishermen belonging, especially to our unit but in general all [3161] fishermen, received honest weights. In fact, he took with him a check weight so he could check the scales.

He also checked the figures of the computations because some of our fishermen do not figure too well, so we thought that was a service for the membership.

(Testimony of Charles McLauchlan.)

The Court: Was that fresh fish, the albacore that was brought up from San Diego, or cannery fish? The Witness: Albacore is both.

The Court: Was that fresh fish that came from that barge, or do you know?

The Witness: It is my——

The Court: Do you know?

The Witness: I mostly know.

The Court: There are too many people in the world like that, which means they don't know.

Mr. Margolis: Your Honor, I want to cite that—

The Court: That certainly is not any profession of knowledge.

Mr. Margolis: That is an unfair characterization of a witness who is trying to tell your Honor what his state of mind is with regard to these matters, and I think your Honor should instruct the jury to disregard that statement.

The Court: No, the jury are not instructed to disregard it. "I mostly know" is a complete lack of knowledge. I asked the witness if he [3162] knows and he can answer the question whether he knows or he does not know.

Mr. Margolis: I want to cite those remarks of your Honor as misconduct.

The Court: You may do so.

Mr. Margolis: And request that the jury be instructed to disregard them.

The Court: Your request is denied.

Mr. Rubin: Now we are going to move that this

(Testimony of Charles McLauchlan.)

testimony be stricken on the ground that it is not apparent that this fish has anything to do with this case at all.

The Court: The motion is granted and the jury are instructed to disregard the entire testimony concerning the barge in the Mexican waters.

Q. (By Mr. Margolis): Mr. McLauchlan, I want to direct your attention to Government's Exhibit 37, which is a letter which purports to bear your signature. Does that bear your signature?

A. Yes, sir.

Q. And that letter was sent out on June 29, 1946 to the Bayside Fish Market?

A. That is right.

Q. Was that letter sent out to any other concerns other than the Bayside Fish Market?

A. No. [3164]

Q. Now there is a letter that was enclosed in that letter, which I believe in Defendants' Exhibit W-2, is it not?

Mr. Rubin: It is a mimeographed letter to the San Pedro dealers, counsel, whatever the number is.

Mr. Margolis: W-2.

Mr. Rubin: We will so stipulate.

Q. (By Mr. Margolis): That letter was enclosed with this letter, is that right, with this letter which is Government's Exhibit 37?

A. Now they both were sent to the Bayside Fish Market. I am not certain that they were sent in the same enclosure. It may be that the other one preceded this one by a day, or maybe they were

(Testimony of Charles McLauchlan.)

taken there by some of our people one day and the next, or maybe both on the same day.

Q. In any event, both letters went to the Bay-side Fish Market? A. Yes.

Q. The only other market that you had that was picketed during the strike was Horman, is that right? A. Horman, yes.

Q. Horman did not get a copy of Defendants' Exhibit 37? A. He did not.

Q. Did he get a copy of the other letter? [3164]

The Court: W-2.

Mr. Rubin: If the Court please, for the purpose of the record it is W-1.

The Witness: I am not certain.

Q. (By Mr. Margolis): You are not certain whether he did or not? A. No.

Q. Now was this letter, Government's Exhibit 37, ever approved by the Newport unit of the Fishermen's Union?

A. Well, as I remember, this letter was drawn up by the strike committee of the Newport unit.

The Court: Have you answered the question?

The Witness: Yes, sir.

The Court: Read the question again, Mr. Reporter.

* * *

The Witness: Well, I think by the time we had a membership meeting a number of other things had happened so that this particular action never as acted upon by a membership meeting. [3165]

(Testimony of Charles McLauchlan.)

The Court: Do I understand your answer to the question to be that it was not approved by the Newport unit then, or is that your recollection, that it wasn't approved by the Newport unit?

The Witness: I think that would be a fair statement.

The Court: What?

The Witness: That it was not acted upon by the Newport unit.

Mr. Rubin: Counsel's question, if the Court please, was whether it was approved. We object to this on the ground it is calling for a conclusion of this witness. He can testify whether it was passed upon.

The Court: He said it was not acted upon by the Newport unit.

Mr. Rubin: The question was whether it was approved.

The Court: He has answered. It was not acted upon. If it wasn't acted upon it wasn't approved.

Mr. Rubin: That doesn't necessarily follow because this is from a strike committee which was set up and which sent that letter.

The Court: You can find that out on cross examination.

Q. (By Mr. Margolis): Was any action taken pursuant to that letter with regard to declaring boats unfair at any time? [3166]

* * *

The Witness: No. The answer is no.

(Testimony of Charles McLauchlan.)

Q. (By Mr. Margolis): Do you know of any situation in which any boat which wanted to deliver fish to the Bayside Market, the concern to which that letter was addressed, was prevented or interfered with by any action of the union from delivering that fish?

* * *

The Court: You understand it?

The Witness: I understand it and I can answer it.

No boat was ever prevented from unloading fish to the Bayside Market and no boat was ever interfered with from unloading fish or any fish products at the Bayside Market, period.

Mr. Rubin: All right. We will move to strike that, if your Honor please, on the ground it is self-serving, and it calls for a conclusion of the witness as to what was prevented or not prevented.

The Court: It is a conclusion, and it is stricken from the record. The jury is instructed to disregard the witness' answer.

* * *

The Court: It is for the jury to determine whether or not boats were interfered with.

Q. Was any action taken by the union with regard to boats which were delivering fish at the Bayside Market either before or after this letter, other than the cases which you have stated in which boats were declared unfair, was any other action whatsoever taken?

A. At no time.

* * *

(Testimony of Charles McLauchlan.)

Cross-Examination

By Mr. Dixon:

Q. During the course of the strike at Newport do you remember whether a non-member fisherman endeavored to deliver some sardines to Mr. Naylor, do you recall that incident, Mr. McLauchlan? [3169]

* * *

The Witness: And I do not—I will say this: I think that Mr. Jones on—I forget the boat now—but I think that he, you might say, endeavored to deliver some fish to Mr. Naylor.

Q. (By Mr. Dixon): And it is a fact, is it not, that he did not deliver the sardines in his boat to Mr. Naylor during the strike?

A. He did not even tie up at Mr. Naylor's dock with the sardines.

Q. And it is a fact, is it not, Mr. McLaughlan, that you as a contact committee, or a member of that committee, contacted him and asked him not to deliver the sardines to Mr. Naylor, isn't that correct?

A. You might say I did ask him not to, yes.

Q. Mr. McLaughlan, I believe you testified that you took up the business of commercial fisherman in July of 1944, [3170] is that correct?

A. Previous to that, you might say, in the capacity of helping to build a fishing boat, maybe I was additionally working two months.

Q. That was the first time, was it, that you had anything to do with the fishing business or the business of catching fish, that is, July, 1944?

A. Thereabouts.

(Testimony of Charles McLauchlan.)

Q. What were you doing prior to that time? That is, what was your business or occupation?

A. I was a shipyard worker.

Q. During what period of time did you work in the shipyards?

A. For the period of, I would say, from 1942.

Q. To July of '44?

A. Not quite to July. Probably till February or March of '44.

Q. What did you do in the interim period, February, 1944, to July, 1944, when you started to go in the fishing business?

A. Well, as I explained, a couple of months I was working preparing this boat to fish.

Q. That is the one you bought?

A. I had bought no boat ever.

Q. Were you working gratis on a boat; were you, preparing it? [3171]

A. Not gratis.

Q. Did you receive any pay for the work that you were doing working on that boat during that period of time?

* * *

The Witness: I did not receive any wages.

Q. (By Mr. Dixon): Did you receive any money for the work you did on the boat during that period of time from anybody? A. No.

Q. Was this the boat you went out in subsequently and did some fishing on?

A. That's right.

(Testimony of Charles McLauchlan.)

Q. Prior to the time you worked in the ship-yards what was your business or occupation?

A. I worked as a piledriver man. [3172]

Q. For what concern or concerns?

* * *

A. I worked as a pile-driver man for a number of contractors.

Q. How long were you in that position, or how long did you do that kind of work?

A. I think two years, roughly speaking.

Q. For just the same concern?

A. No; I said for a number of contractors.

Q. For a number of different concerns. I believe you testified that you became the business agent of the Newport Beach unit in September of 1945; that is correct, it is? A. Yes. [3173]

Q. And that you retained that position until November of '46? A. That's correct.

Q. And from there you went into the bee business, is that correct?

A. From there I became a full-time defendant in this court.

Q. What business or occupation——

The Court: What is that,—November, 1946?

The Witness: I am mistaken, your Honor. I didn't become a full-time defendant in this court at that time. I didn't go in the bee business at that time.

The Court: Mr. McLauchlan, the fact is that you have been excused from time to time, upon the

(Testimony of Charles McLauchlan.)

special request of your counsel to this court, since this trial has been commenced and the evidence has been put on, haven't you?

The Witness: For a period of a month or so I was here every day, your Honor, that is what I was referring to.

The Court: I see.

The Witness: Now, from November I was unemployed for some time. There was no fishing going on.

Q. (By Mr. Dixon): And you are in business on your own behalf at the present time?

A. Yes, sir.

Q. You were on the committee, were you not, that [3174] presented the stabilization contract to Mr. Naylor in May of 1946?

A. Yes, sir.

Q. And that contract was presented to how many other dealers at Newport at that time?

A. It was presented to—do you want the number or enumeration?

Q. How many other dealers did you present it to at the time that you presented it to Mr. Naylor?

A. We presented it to one, two—well, you mean in that period, not at the same time? You mean in that period?

Q. Withdraw that. The contract was presented to Mr. Naylor in May, latter part of May, 1946, was it not?

A. That is correct.

Q. And the same contract, Exhibit 3, was presented to another dealer at Newport Beach at the same time by yourself and other members of the committee, was it not?

(Testimony of Charles McLauchlan.)

A. Well, a day or two before——

Q. Please answer my question yes or no.

A. A day or two before——

Q. Just answer my question whether you did or didn't please.

A. Well, the same day?

Q. Did you understand my question, Mr. McLauchlan?

Mr. Margolis: If your Honor please, I object to this as argumentative. [3175]

The Court: It is not argumentative, counsel. The witness if he doesn't understand the question he can state so, and I will sustain an objection on that ground. But counsel has a right to ask him if he understands it. The witness is taking his time, he is very deliberate in answering questions, very careful in weighing his answers.

Read the question.

(The question referred to was read by the reporter as follows:

“And the same contract, Exhibit 3, was presented to another dealer at Newport Beach at the same time by yourself and other members of the committee, was it not?”)

The Witness: I do not understand.

The Court: You don't understand that question?

The Witness: I do not understand the term “same time.”

The Court: Wait a minute.

The Witness: It he means——

(Testimony of Charles McLauchlan.)

The Court: Just a minute. You say you don't understand the term "same time"?

The Witness: That is correct.

Q. (By Mr. Dixon): At about the same time, then, Mr. McLauchlan. Does that help you any?

A. Somewhat.

Q. All right. Now, can you answer my question?

A. We presented the contract to four other concerns at about the same time.

Q. And will you name those concerns, please?

A. The Commercial Fishermen's Co-operative Association, the John P. Harmon Company, the Larry Fisher Fish Company, and there was another concern which was just starting to buy market fish to which we presented a contract, but—well, that is the end of the answer.

Q. And it is a fact, is it not, that some of those dealers to whom you presented the contract signed the contract?

A. That is true.

Q. It is also a fact, is it not, that two of the concerns mentioned to whom this contract was presented did not sign the contract, is that correct?

A. That is correct.

Q. And will you tell the jury which companies those were that didn't sign the contract?

A. The Bayside Fish Company, and the John P. Harmon Fish Company.

Q. You were present, were you not, at a meeting of the Joint Executive Committee of Local 36 held on May 25, 1946?

A. I am not sure of any date. [3177]

(Testimony of Charles McLauchlan.)

Q. Well, do you recall whether you were present at a meeting at any time the latter part of May, 1946, at which it was moved, seconded and carried that all dealers signing our agreement shall be allowed to accept fish providing that each one signing agrees that he will not deliver any fish bought from us to any dealer not signed with us?

* * *

A. I remember.

Q. And it is a fact, is it not, that that action was taken by the Joint Executive Committee meeting on or about the date mentioned, namely, May 25, 1946?

A. I am not certain of that. [3178]

Q. If that were in the minutes of the meeting purporting to have been held at that time, would you say that that action was taken at that meeting?

A. If I saw the minutes, I might.

Q. Now in Newport after the strike began these nonstriking dealers were picketed by members of Local 36, were they not?

A. That is correct.

Q. And the signing companies, that is, the companies that you have referred to that signed the contract, Exhibit 3, were not picketed, were they?

A. That is correct.

Q. And it is a fact, is it not, Mr. McLauchlan, that in accordance with the action that I have just mentioned, which was taken by the joint executive committee of Local 36 on May 25, you thereafter notified the San Pedro units that some of their dealers, that is, the San Pedro dealers, were report-

(Testimony of Charles McLauchlan.)

ed trying to sell fish to these two markets that you were picketing in Newport Beach?

* * *

A. That is not a fact.

Q. Did you ever notify Mr. Morkowski to that effect? A. He is not in San Pedro.

Q. I am sorry. I meant San Diego. Did you take such [3179] action with reference to notifying Mr. Morkowski in San Diego with reference to the dealers there? A. Correct.

* * *

Q. And you did send this telegram to Mr. Morkowski, dated June 3, 1946, Government's Exhibit 503, did you not? A. I did.

Q. Which reads as follows:

"Your dealers reported trying to sell fish to unfair markets in Newport Beach. Please inform them Bayside Fish Market and John Harmon unfair. Will call you Tuesday morning for better communications."

And it is a fact, is it not, Mr. McLauchlan, that on June 6 all ports, San Diego, San Pedro, Redondo, Santa Monica, Morro Bay and other necessary ports were notified by or through you and Local 36 that Bayside Market and John Harmon were unfair, as you call it?

A. Well, I am not sure that I notified them or that it was through me, but I am sure they were notified.

Q. That you are sure of? A. Yes. [3180]

* * *

(The jury retired from the courtroom at 3:15 o'clock p.m.)

The Court: Has your document arrived?

Mr. Kenny: Yes.

The Court: You have handed government counsel a copy?

Mr. Kenny: Yes. This is an offer of proof of the witness Dr. John B. Schneider.

The Court: And it is stipulated that the offer is made as if the witness were sworn and on the stand?

Mr. Rubin: So stipulated, your Honor.

The Court: And the appropriated questions asked him to provoke the responses set forth in this document?

Mr. Rubin: Yes, your Honor.

* * *

OFFERS OF PROOF

Mr. Margolis: We have certain other offers of proof that we might get out of the way at this time, your Honor.

Mr. Kenny: Would that be given a number, or how are we doing it?

The Court: What was the number of the other one?

The Clerk: GG.

Mr. Kenny: That would be GG-1.

(The document referred to was marked Defendants' Exhibit GG-1 for identification.)

Mr. Margolis: With regard to the offer I want to make in a few minutes, I could put questions to the witness that would be proper in order to lay the foundation because your Honor ruled previously, and I assume the offer would be made as though the questions had been asked.

Mr. Rubin: We have no objection to the form, if that is what counsel wants.

Mr. Andersen: We have one here that we would ask be marked.

The Clerk: GG-2.

(The document referred to was marked Defendants' Exhibit GG-2 for identification.)

The Court: This is made on the same basis as if the witness were on the stand, sworn and questions were asked that would elicit these answers?

* * *

The Court: It is GG-2.

Mr. Andersen: And purports to be a statement showing the average earnings of fishermen at Newport Beach.

* * *

Mr. Margolis: Now with regard to the witness Robert M. Phelps, we offer to prove that when he started fishing in 1934 that for the first few years thereafter he did not earn in excess of \$1000 a year from full-time fishing efforts;

That since 1934 and up to the present time he has never in any year earned in excess of the amount of \$2000;

That his maximum earnings have been slightly less than \$2000 in any one year.

For these earnings he has fished on the average of nine months a year full time and spent about two or three months working on a boat, working on repairing a boat, for which he received no extra compensation.

I offer to prove by this witness that he has no property except a little fishing gear; no car; no life insurance. And we offer to prove, with regard to him and all the other fishermen, that they carry no insurance on their boats because they are unable to afford it.

Mr. Dixon: Is that true with reference to Mr. Knowlton?

Mr. Margolis: Mr. Knowlton too, it is my understanding, carries no insurance.

* * *

Mr. Margolis: I offer to prove further, with regard to Mr. Phelps, that the boat he was working on was sunk this year and that he and five other fishermen were picked up by a purse seiner; that he lost all of his papers, clothes and records, and that is the reason that he cannot give his exact earnings, because he had records of his exact earnings, but that he knows that his earnings were not in excess of \$2000 in any one year.

We do have his exact earnings, and we offer to prove his exact earnings, for the years 1945 and 1946 as being, total earnings of \$1723 for 1945 and \$1016 for 1946. During neither of these years did he own his own boat, but during the year he owned his own boat he never made more than \$2000.

With regard to the defendant McComas, we offer to prove that if allowed to ask appropriate questions that in 1942, the first year that he fished commercially, he earned a little less than \$2000;

That since then his earnings have been below the amount of his earnings for the first year, and for the last two years he hasn't made enough money to pay any income tax.

In 1943 his earnings were about \$1200; in 1944 about \$1,800.

With regard to the defendant McLauchlan, we offer to prove that during the time that he was a fisherman he lived in a trailer for most of that period, for which trailer he paid \$175, because he was unable to obtain or afford a home in which to live; that his entire other property is a 1937 Graham automobile; and that he owns nothing else.

Also that his earnings during the time that he fished averaged approximately \$100 a month, except for three or four months when he fished abalone, during which months his earnings averaged slightly in excess of \$125 a month.

That is all.

The Court: It seems to me as though you are offering all that evidence in the wrong form. It might be appropriate before a congressional committee, but I do not think it is material here.

Mr. Margolis: It goes to the question we have already argued.

The Court: That is right.

Transcript of Testimony
(Resumed)

Mr. Rubin: Just for the purpose of the record, your Honor, we object to the oral offer just made on the ground of immateriality and at the same time we will object to Defendants' Exhibit GG-2, the average earnings of fishermen on the same ground. [3181]

* * *

Mr. Margolis: We have talked to government counsel about a witness we have here from the Fish and Wild Life Service who we would like to put on the stand and permit to leave.

The Court: Out of order?

Mr. Margolis: Yes. Government counsel say they have no objection.

The Court: Surely.

Mr. Margolis: Mr. Hinkle.

HARRY B. HINKLE

called as a witness by and on behalf of the defendants having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Margolis: .

Q. Mr. Hinkle, you are connected with the Fish and Wild Life Service of the Department of the Interior? A. That's right.

Q. In what capacity? [3183]

A. I am in charge of the Market News Office.

The Court: Of the what?

(Testimony of Harry B. Hinkle.)

The Witness: Market News Office.

Q. (By Mr. Margolis): Is that the Market News office in San Pedro?

A. At San Pedro, yes.

Q. How long have you worked for that agency in that capacity?

A. In that capacity since August 1, 1945.

Q. And prior to that time?

A. Prior to that, since May 2, 1942 with the Fish and Wild Life Service in Washington, D. C.

Q. In other capacities?

A. In other capacities, yes.

Q. Were your capacities in Washington with relation to marketing problems?

A. Yes, I was hired in the first place for work with the market development section, at that time headed by Mr. Russell.

Q. Now you are out here in San Pedro doing the work that you have indicated?

A. Yes, sir.

Q. In the year 1946, during the months of April and May, did you attend any conferences with relation to the problems of marketing fresh fish in this area? [3184]

A. I attended several meetings devoted to the promotion of the sale of fish, yes.

Q. When was the first of those meetings held?

A. The first of those meetings was held in Los Angeles on, I believe it was, April 22nd.

Q. And where was it held?

A. That meeting was held in the offices of the Central Fish and Oyster.

(Testimony of Harry B. Hinkle.)

Q. It that a wholesale fish company in Los Angeles?

A. That is a wholesale fish company in Los Angeles presided over by Mr. Bevarino.

Q. You mean he is the owner of it, or the manager?

A. At least the manager; yes, sir.

Q. Do you know who called that meeting? Perhaps let me ask you this: How were you invited to that meeting, or did you invite the others to that meeting?

A. I am not certain how that meeting was called, but in the beginning I received a wire from my chief in Washington to proceed to Seattle some time in the early part of April and meet Mr. Russell of the market development section there.

Q. Mr. Russell is your superior?

A. Not at that time he wasn't. He was formerly my superior.

Q. The head of the market development section of the Fish and Wildlife Service?

A. That is right. While there we talked to two or three of the dealers and several of the union officials in Seattle, where this fish promotional work had started, and then proceeded to Los Angeles at which time this meeting was called for April 22nd.

Now I can't recall who called that meeting. It may possibly be that Mr. Russell got in touch with Mr. Woods who was the secretary of the Western Seafood Institute and he called the meeting. [3186]

(Testimony of Harry B. Hinkle.)

Q. What is the Western Seafood Institute that you speak of?

A. Western Seafood Institute was an institute composed of fish dealers in this area.

Q. Wholesale or retail or both?

A. Wholesale dealers.

Q. Who was present at this meeting besides yourself? I am talking about this first meeting.

A. At the first meeting there was Mr. Russell—

Q. That is the Mr. Russell from the Fish and Wildlife Service?

A. Mr. Russell from the Fish and Wildlife Service, Mr. Tendick of the Fish and Wildlife Service, and myself; Jiff Kibre, Gilbert Zafran, and Mr. Crane.

Q. I wonder if you would identify these persons as you go along?

A. Mr. Kiber is——

Q. I think we know who Mr. Kiber and Mr. Zafran are.

A. Mr. Crane at that time was connected with the IFAWA on the newspaper.

Then Mr. Puccinella of the Paladini Seafood and Mr. Bevarino of the Central Fish and Oyster and Mr. Woods, the secretary of the Western Seafood Institute, those were all I can recall that were at that meeting. [3187]

Q. I wonder if you would tell us rather briefly and rather summarize for us what was said by the persons there. Just tell us the gist of what was said.

A. Well, it all related back to the Seattle crowd.

(Testimony of Harry B. Hinkle.)

At that time there was a surplus of rockfish in the northwest area at Astoria and Seattle, due to the fact that a large market had been developed during the war through the armed services. That had fallen off to some extent and there were large cold storage holdings of rockfish, rockfish filets, and at a subsequent meeting at Seattle, at which I did not attend, the union and our service and several of the wholesale dealers in Seattle had gotten together and proposed that the union and the wholesale dealers should be assessed, as I remember it, a quarter of a cent a pound on the fish landed, this money to be used as an advertising fund to promote the sale of the rockfish filets.

Q. Sale to whom? A. To the public.

Q. To the consumer?

A. To the consumer, yes.

Q. All right. Go ahead.

A. And they proposed that this promotional campaign be carried on in Los Angeles because of this being a large metropolitan area and they thought a test campaign could be carried on here and if it was successful they might be able to [3188] carry it on in other cities in the United States.

So we had this meeting, the first meeting, in Los Angeles and discussed the proposal of the Seattle crowd, and at this April 22nd meeting most of those present had thought that the Los Angeles crowd would prefer to put on a campaign to promote the sale of fish to the public on all species of fish rather than rockfish, and that was the general

(Testimony of Harry B. Hinkle.)

theme at that time, and we decided to have a meeting at a later time and invite more of the dealers to be present. [3189]

Q. Was a second meeting held?

A. Yes, a second meeting was held on the 4th of May. Q. 1946?

A. 1946, yes.

Q. And where was that meeting held?

A. That was in the Subway Terminal Building.

Q. Do you know whose office?

A. It was in no office. It was called by—may I use these (indicating)?

Q. Those notes that you have?

A. There are a couple of letters I wrote to Mr. Russell after these meetings, and somewhere here it should have the room number of those buildings.

Q. Those letters were written immediately after the meetings were held?

A. One is written on May 8th and the other on May 13th. Q. All right.

* * *

The Witness: It was in the Subway Terminal Building in an office that was rented by Mr. Woods.

Q. (By Mr. Margolis): Mr. Woods of the——

A. Western Seafood Institute. I see here [3190] that the second meeting was held in Room 438, and I think it was the same room as the first meeting.

Q. Who was present at that second meeting?

A. Well, there was the same group that was present at the first meeting, plus several advertising men, men representing advertising firms, and at the

(Testimony of Harry B. Hinkle.)

second meeting Mr. Russell from our office was not in attendance, he had returned to Washington—or to Chicago, pardon me.

Q. Were there any additional dealers there?

A. The only additional dealer I can recall was Mr. Holbert who was representing Freeman Wholesalers.

Q. That is a fresh fish wholesaler, is that right?

A. Yes.

Q. Is that the largest fresh fish wholesaler in this area?

A. Well, they do a large volume of business. I don't know as they are the largest.

Q. All right. Will you tell us the gist of what was said at the meeting in May?

A. Well, there was some of the same discussion as at the first meeting, but with the exception that at this particular meeting they were attempting to form plans whereby this campaign could be carried on. Some of those present thought that we should decide on what sort of a campaign should be [3191] carried on, and when that was determined the members of the Western Seafood Institute should be assessed an amount of money which would carry on the type of campaign that they thought proper. Others that were present thought that they should do the assessing first to see how much money they could get together for an advertising campaign, and then base their campaign on that particular amount of money.

(Testimony of Harry B. Hinkle.)

Q. What was the end result of the meeting? What action, if any, was taken at this meeting?

A. At that meeting they appointed a committee to study over these proposals and suggested a meeting for a later date, which was, as I recall, May 10th.

Q. Were you a member of that committee?

A. I was a member of that committee, yes.

Q. Was a meeting of that committee held?

A. Yes, that meeting was held on May 10th.

Q. Where was that held and who was present?

A. That was held in the Subway Terminal Building and those in attendance were Mr. Zafran, Mr. Woods, Mr. Puccinelli.

Q. Who was Mr. Puccinelli? Have you identified him previously?

A. I identified him previously as being with Paladini Seafood Company. I think he was the general manager of the Paladini Seafood. And Mr. McLauchlan was there, and Max Freeman, and Mr. Chilton from our Washington office, and [3192] myself; and as guests there were Mr. Neiman, Mr. Portman—pardon me, Mr. Neiman was with the Spencer Curtis Company.

* * *

A. (Continuing) Also present were Mr. Neiman with the Spencer Curtis Company, and a Mr. Portman with the same company, and Mr. Rodriguez with the Pacific Fisherman, that is a fisherman's magazine; Mr. Crane of the IFAWA [3193] at San Pedro; and Lionel Shatz, who was the manager of Paladini Company in San Francisco.

(Testimony of Harry B. Hinkle.)

Q. (By Mr. Margolis): Will you tell us briefly the substance of what was said and done at that meeting?

A. We carried on the same discussions as we did the first two meetings as to promoting the sale of fish in this area to the consumer, and tried to devise a way of doing this. There was some discussion about the raising of money and the hiring of some advertising firm to carry on this campaign, but it all sort of fell through when it was brought up there that they thought that the Western Seafood Institute should carry on the campaign and handle the money and do the promotional work, and it was brought out there that the by-laws of the Institute did not allow them to carry on a campaign of this sort, because they were designed primarily to advise the fish dealers on O. P. A. prices, and so forth, and until they could obtain a quorum of dealers they could not revise the laws of the Institute to include this sort of campaign. And the meeting broke up without much more said, and there was no more done about it. [3194]

Q. Can you tell us briefly what happened to that program subsequently, if anything?

A. I don't understand the question.

Q. Was anything further done? Were any further meetings held or any further action taken in connection with the subject matter of the conference?

A. These three meetings were all that were held.

(Testimony of Harry B. Hinkle.)

Q. Nothing further happened after that?

A. No.

* * *

Q. Do you know whether the prices paid for fish caught in this area by the canneries have been uniform for the past few years?

Mr. Rubin: Objected to as immaterial.

The Court: Objection sustained.

Q. (By Mr. Margolis): Do you know whether the prices paid in Seattle for fresh fish have been uniform and based upon price contracts during the past few years?

Mr. Rubin: Same objection.

The Court: Objection sustained. [3195]

* * *

Cross-Examination

By Mr. Rubin:

Q. Mr. Hinkle, I believe you testified that your subdivision of the Fish and Wildlife Service is called the market development section, is that correct?

A. Not the one I am connected with at the present time.

Q. The one you were connected——

A. The one I was connected with at Washington was at that time called the Economic and Cooperative Marketing Section.

Q. And that was when you were in Washington?

A. That was when I was in Washington; yes.

(Testimony of Harry B. Hinkle.)

Q. But this activity that you were carrying on out here was under the market development section, isn't that correct?

A. Yes. That economic and cooperative marketing section was later divided and made into an economic section and into a marketing development section, two different sections.

Q. And so the activities that you were carrying on out here was the market development section?

A. That is right.

Q. And these discussions and meetings that you had with these people had to do with the sale, [3196] with the promotion of the sale of fish, to the public at large, is that correct?

A. Yes.

Q. It didn't have anything to do with the price which the fishermen were supposed to receive from the buyers at the wharf, did it?

A. No.

* * *

Q. Did it have anything to do with the—well, the members of this committee, this group, was composed of all people interested in the sale of fish throughout the entire area in Southern California, isn't that right?

A. That is right, the dealers, the union and the Government.

The Court: And the advertising man?

The Witness: And the advertising man.

(Testimony of Harry B. Hinkle.)

Q. (By Mr. Rubin): It was a means of exploiting the sale of fish essentially, was that the purpose of the program?

A. Essentially it was designed to sell more fish by helping all those right along the ladder.

Q. And had nothing to do with the stabilization of the fish industry at any particular level [3197] then, is that correct?

A. What do you mean by stabilization of the industry?

Q. Fixing the minimum prices, for example, at any particular level, either from the fishermen to the first buyer, or the first buyer to the wholesaler, the wholesaler to the retailer, or to the consumer?

A. No.

Q. And was anybody excluded from participating in this program? Could anybody who was interested participate?

The Court: As far as you were concerned?

The Witness: Yes, I would say yes.

Q. (By Mr. Rubin): In so far as the Government was concerned? A. Yes.

Q. Was there any formal organization set up for the purpose of selling fish as a result of these conversations? A. No.

Q. Was there any discussion of setting up an organization to sell fish as a result of these discussions with this organization?

A. What type of an organization?

Q. An organization which would sell fish to anybody.

(Testimony of Harry B. Hinkle.)

A. The only organization that would have been set up would have been an advertising organization and possibly a cooperative group of the fishermen and dealers. [3198]

Q. The fishermen and dealers combined, is that correct?

A. To promote the fish, not as selling the fish over the counter or anything like that.

Q. Or selling the fish from the boat to the dock-side? A. No.

Q. Now as I understand your testimony, this idea originated up in Seattle, is that correct, for the purpose of endeavoring to dispose of surplus species of rock bass that had accumulated up there, is that right? A. The rockfish; yes.

Q. Rockfish? A. Yes.

Q. That was up in Seattle?

A. That is right, Seattle and Astoria.

Q. That is where this idea originated?

A. Yes.

Q. Nothing came of that program, you say, at all? A. The end result, no.

Q. And there was no other cooperative endeavor set up except for the purpose of possibly setting up an organization to handle the funds to pay out for advertising? A. That is right.

Q. That is the sum total of what this proposal was to be, is that right? A. Yes. [3199]

CHARLES McLAUHLAN

resumed the stand and testified further as follows:

Cross-Examination

(Continued)

By Mr. Dixon:

Q. Mr. McLauchlan, you were a member of the negotiating committee of Local 36, Newport Beach Unit, were you not? A. That is true.

Q. When were you a party to such a committee?

A. Well, I think it was somewhere around the middle of May.

Q. And continued as a member of that committee, did you, until you resigned as business agent of Local 36, Newport Beach Unit?

A. I think that would be the correct answer, because I never was removed; the committee was never dissolved.

Q. When was this committee formed? Can you tell the jury that?

A. Well, I think that we hadn't had a negotiating committee before that time. Roughly the middle of May 1946. [3200]

Q. And who appointed the members of the committee?

A. I think they were selected at a membership meeting of the unit by nominations.

Q. By nomination?

A. Yes, from the floor.

Q. And the other persons on this committee were Mr. Phelps, Mr. Miller and Mr. Munson, is that correct? A. Not the original committee.

(Testimony of Charles McLauchlan.)

Q. At least they were on the committee at the time you served on it in the month of June, were they not? A. The original committee was——

Q. Were they or were they not, Mr. McLauchlan?

A. They attended some of the meetings later.

Q. Can you answer my question?

The Court: Strike the answer. Read the question, Mr. Reporter.

(The question referred to was read by the reporter as follows:

“Q. At least they were on the committee at the time you served on it in the month of June, were they not?”)

The Witness: They weren't on the committee at the beginning of the time I served on the committee.

The Court: Strike the answer. Read the question again.

(The question referred to was reread by the reporter as set forth above.) [3201]

* * *

The Witness: I think the latter part they were on the committee, yes.

Q. (By Mr. Dixon): Now, Mr. McLauchlan, as business agent of the Newport unit, you were rather active in the activity of that unit during the strike in June, were you not? A. Yes, sir.

Q. Did you ever issue a clearance card or give a clearance card to any non-members of the union for purposes of permitting them to fish?

A. I don't believe I ever gave anyone a clearance card.

(Testimony of Charles McLauchlan.)

Q. Did you ever have any conversation with Mr. Soudur about his securing a clearance card?

A. I believe that I was sent down to talk to him once.

Q. Did you ever give him a card or were you with him when a card was given him, this clearance card, by the unit?

A. One evening Mr. Soudur came to a meeting of the strike committee——

The Court: Just a minute. Strike the answer. Read the question, Mr. Reporter.

(The question referred to was read by the reporter as set forth above.)

The Court: Do you understand that question?

The Witness: I was at a meeting where he was present. [3202]

The Court: Just a minute. Do you understand the question that was just read to you? Read it again, Mr. Reporter.

(The question referred to was reread by the reporter as set forth above.)

The Witness: No. 1, I did not ever give him a card; No. 2, I was present when he received a card. So I guess I was with him when he received a card.

Q. (By Mr. Dixon): But you didn't give him the card yourself?

A. No, sir.

Q. Did you sign the clearance card yourself?

A. To my best recollection, I don't think so. Now if you have the card——

(Testimony of Charles McLauchlan.)

Q. Did you make a practice of signing any of the clearance cards for the Newport unit?

A. I was not in that department.

The Court: Strike the answer. Read the question.

(The question referred to was read by the reporter as set forth above.)

The Witness: To my recollection I didn't sign any cards.

Q. (By Mr. Dixon): Now in connection with the operation of the strike at Newport, I believe you testified that committees were set up to contact non-cooperating boats, is that correct?

A. That is correct. [3203]

Q. And by non-cooperating boats you mean boats that were either owned or operated by non-members of Local 36, is that correct?

A. No. I can explain it, if he wants.

Q. Did you have any non-cooperative boats which were owned by any members, owned or operated by any members, of your Local 36 at Newport?

A. I don't recollect any.

Q. So that if there were any such boats they would be either owned or operated by non-members of your local unit then. is that correct, Mr. McLauchlan?

A. That is true, but that isn't the whole answer.

The Court: Do you wish to explain your answer?

The Witness: I would like to.

The Court: All right.

(Testimony of Charles McLauchlan.)

The Witness: We had a large number of non-member boats who did cooperate and a small number who did not cooperate.

The Court: That may be stricken. He was talking about the non-cooperating boats.

Q. (By Mr. Dixon): Will you answer the last question, please, Mr. McLauchlan?

Mr. Margolis: I thought he had answered it, your Honor.

The Court: Yes, it was answered. [3204]

Q. (By Mr. Dixon): I will hand you what is marked and noted as Government's Exhibit 33 and ask you if that is your signature on that card.

A. That is, yes, sir.

Q. And is that a clearance card that was used by Local 36, Newport unit, during the strike period?

A. That's right.

Q. And that is your signature, then, on that card?

A. Yes, sir.

Q. And to whom is the card made out?

A. To Morris Souder.

* * *

Q. (By Mr. Dixon): I believe you testified that the issuance of these clearance cards was not within your department, is that right?

A. That is what I said, yes, sir.

The Court: That is what he said, but I struck his answer.

Q. (By Mr. Dixon): On the back of this exhibit, Government's Exhibit 33, there is a notation,

(Testimony of Charles McLauchlan.)

“\$24 due for back picket duty,”—did you make that insertion on the picket card, Mr. McLauchlan, or the clearance card?

A. I am not certain.

Q. Well, I will hand it to you again and ask you if that is your handwriting. [3205]

A. That is my handwriting, yes, sir.

Q. So that you made that writing on the back of Government's Exhibit 33?

A. Yes, sir, I did.

Q. And, Mr. Souder was not a member of your local unit, was he? A. He was not.

Q. During the operation of this strike I believe you mentioned the fact that you had a contact committee to contact these non-cooperating boats, is that correct. A. Yes, sir.

Q. And the members of that committee did, in fact, contact the operators of the boats that were not owned or operated by members of your unit, didn't they?

A. They contacted non-members and members.

Q. All right. I am asking you about non-members now. Wasn't the function of this committee to contact non-members? [3206]

* * *

The Witness: There was a separate committee for each one to be contacted, of his friends.

Q. (By Mr. Dixon): Well, you were on this committee, were you not, Mr. McLauchlan?

A. I was supposed to be on all of the committees, yes, that went to see different people, that's right.

(Testimony of Charles McLauchlan.)

Q. And the strike committee meeting of June 7th took action, moving, seconding, and carrying a motion to the effect that the contact committee contain three union men, but that you must be on the committee, is that correct?

A. That's right.

Q. As business agent of the union was it one of your functions to solicit members and memberships in the union?

A. Yes, sir.

Q. And did this contact committee solicit these non-member boat owners or operators to join the union?

A. Very seldom. In fact, I don't remember our soliciting their membership.

Q. I didn't say "membership"; I said "non-members."

The Court: He has answered it.

Q. I didn't get your answer.

The Court: All he was trying to say was he didn't remember soliciting non-members to take membership.

The Witness: At that time on this committee, no, sir.

Q. (By Mr. Dixon): There was another committee also appointed to act known as the visiting committee, was there not, Mr. McLauchlan?

A. Well, I don't know if it was a separate committee just offhand at this distance.

* * *

Q. (By Mr. Dixon): So that you have no recollection or knowledge of the function or duties of

(Testimony of Charles McLauchlan.)

any so-called visiting committee of your local unit, Newport unit of Local 36? [3208]

* * *

The Witness: Perhaps you can refresh my recollection. It may be that this committee we have been talking about was the visiting committee for all I can remember, because it visited people.

Q. (By Mr. Dixon): Did the contact committee have any name other than the contact committee, to your knowledge?

* * *

The Witness: It may be in different minutes it was called a different name. [3209]

* * *

Q. (By Mr. Dixon): That is not my question.

The Court: The question is whether you know. Do you now know?

The Witness: I am afraid I don't know.

Q. (By Mr. Dixon): At the time the albacore was sighted in June, as you have testified, were you still issuing clearance cards?

A. I personally, or the union?

Q. The union. Was the union still issuing clearance cards to non-members? A. Yes, sir.

* * *

Q. (By Mr. Dixon): During the month of June was there any waiver of the provision set up requiring or relating to the establishment of a clearance card system for non-members of the union? A. No.

Q. I believe you testified——

(Testimony of Charles McLauchlan.)

The Court: Just a minute. From the previous question I thought you were getting at whether a man had to get a clearance to go and catch albacore. Isn't that what you want to know?

Mr. Dixon: Yes.

The Court: Ask him that.

Q. (By Mr. Dixon): When the albacore showed, as you have testified, Mr. McLauchlan, was it necessary for a non-member fisherman to go out and get any clearance card from Local 36 to fish for albacore?

A. A lot of them didn't—

Mr. Margolis: Just a minute. I object to that question on the ground it is ambiguous, and on the ground that the word "necessary" is uncertain and indefinite. Whether it was a union regulation would be one question.

The Court: I think that we all understand what is meant by that: if the union considered it necessary. [3211]

Q. (By Mr. Dixon): What is your answer?

A. A lot of them didn't.

The Court: Strike his answer. Read the question.

(The question referred to was read by the reporter as follows:

"When the albacore showed, as you have testified, Mr. McLauchlan, was it necessary for a non-member fisherman to go out and get any clearance card from Local 36 to fish for albacore?")

The Witness: No.

(Testimony of Charles McLauchlan.)

Q. (By Mr. Dixon): It is a fact, is it not, that your picketing continued, of the two non-signing markets, during the month of June when the albacore were running?

A. That is right.

Q. You testified that a greater volume of fish came in to Newport in June of '46 than ever before. It is a fact, is it not, Mr. McLauchlan, that many of the boats that were fishing out of San Pedro on clearance cards brought their fish to Newport during the month of June, did they not?

A. Correct.

Q. And when they did so their fish were delivered and sold to the signing dealers at the Newport port, were they not?

A. That is correct. [3212]

(The following proceedings were had in the absence of the jury.)

The Court: Your offers of proof GG and GG-1, before the jury comes down, I suppose we had better take those up.

* * *

OFFERS OF PROOF

Does anybody wish to be heard in connection with that?

Mr. Rubin: I don't think our objections are formally in the record. At this time we will object to the offer of proof set forth in Defendants' Exhibits, for identification, GG and GG-1, and each

and every part thereof, on the ground are incompetent, irrelevant and immaterial, not tending to prove or disprove any of the issues of this case; and, further, that they are hearsay, not the best evidence. But essentially on the ground that they are immaterial.

Mr. Margolis: Do I understand the objection is made on the basis of lack of foundation?

Mr. Rubin: No, I didn't—

Mr. Margolis: If it is a question of hearsay, then we are going to put a witness on, your Honor, in order to establish that it is not hearsay. We want to put a witness on.

The Court: One of them is proffered as opinion evidence.

Mr. Margolis: But that doesn't make it subject to the hearsay objection, your Honor.

The Court: It is hearsay.

Mr. Margolis: But not subject to the hearsay objection, your Honor, if a proper foundation is laid.

The Court: That's right, if a proper foundation is laid.

Mr. Margolis: Therefore I assume what counsel means is that our foundation is inadequate to escape the hearsay rule. We feel that we can lay—if our foundation is adequate, then if it is expert testimony the hearsay rule does not apply, your Honor. It may be immaterial or irrelevant, that is another objection.

The Court: I understand your position.

Mr. Rubin: I wish to clarify our objection.

The Court: You say you wish to clarify it?

Mr. Rubin: I want to state that portion of the objection will not go to lack of qualification of the witness.

The Court: That is, the lack of foundation?

Mr. Rubin: Yes, there is no objection on the ground of lack of foundation, let's put it that way.

Mr. Margolis: If your Honor please, I still don't quite understand this, because if there is a hearsay objection I don't know what other basis it can be upon except lack of foundation.

The Court: Well, if it is immaterial and it is not lack of proper subject for opinion evidence, then the hearsay rule applies even though there may be no objection to the hearsay. In other words, a man may be perfectly qualified to express his opinion on a subject, but it may not be an appropriate case for an opinion to be expressed, in which event it would be subject to the objection on the ground that it is hearsay, and I suppose that is the process of your reasoning in connection with it, is it?

Mr. Rubin: Yes. We don't desire—we are not testing the qualification of the person who expresses an opinion.

The Court: I have read both GG and GG-1. I think it is probably true, as defense counsel suggested, many if not most of the things that are touched upon in each of the documents have been heretofore either discussed or proffered in evidence or talked about, or urged that the court take judicial notice of.

The objection is sustained on the ground that each and every and all of the things contained therein

are immaterial and incompetent and irrelevant, and no other ground.

Mr. Margolis: There are some of the matters there which I think might be——

The Court: In long documents like that and put up as they are, in the sequential story you have probably covered things which have already been admitted in evidence.

Mr. Margolis: I mean that some of the matters have not been admitted in evidence, but are, I think, matters which go directly to the evidence put in by the government.

I don't know whether your Honor wants me to point it out to him.

The Court: No. I considered that in connection with that when I was reading them over, and the ruling will stand as it is.

Mr. Kenny: Your Honor, I just want to call your attention to one matter that is new and that is the existence of bargaining associations in the collective marketing field. Dr. Schneider made some study of that and reports on the existence here in this county of sales agencies for milk in Downey and Bellflower, and that is certainly new matter.

The Court: I still think it is immaterial. I think if I had as good an understanding at the commencement of the trial of all the facts involved here, I think we could have shortened the trial. I think I have admitted a great deal of material in the trial which in my view of the law as applicable to this case would not be material, but it is in evidence.

TRANSCRIPT OF PROCEEDINGS

(Resumed)

The Court: I have another matter to bring up. Yesterday morning I received a telephone call from the secretary of the juror Irvin, who stated that he had had a ruptured stomach ulcer during the night and was committed to the hospital. I requested her to get ahold of the juror's doctor, and in this morning's mail I have received this communication on the letterhead of J. K. Johnson, M.D., 9345 Venice Boulevard, Culver City, California.

(Discussion in regard to alternate juror reported but not transcribed.)

The Court: All right. Call the jury down. By the way, in connection with those written offers of proof, I suppose it may be stipulated that they may be filed, without being copied into the transcript of the record?

Mr. Margolis: As long as they are considered as though they were read into the record.

Mr. Dixon: So stipulated, your Honor.

The Court: Very well.

(The jury returned to the court room, and the following proceedings were had in the presence of the jury.)

The Court: We cannot have the usual stipulation this morning. Mr. Irvin's secretary phoned yesterday and said that he had a very severe illness, and this morning I received a letter from his doctor stating the nature of his illness, which was ruptured

stomach ulcers, and he is confined to the hospital and will be for some time. For that reason Juror Irvin is permanently excused, and the clerk will swear juror No. 13, the alternate, Mrs. Brown.

(Alternate Juror, Mrs. Agnes Brown, was sworn.)

The Court: If you will take place No. 3 now and hereafter, Mrs. Brown.

The record will show that the jury as now constituted is present and each of them is present and in their respective places. So far as the defendants are concerned, I suppose the usual stipulation?

Mr. Dixon: So stipulated.

Mr. Rubin: So stipulated, your Honor.

* * *

C. LLOYD MUNSON

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Margolis:

Q. Mr. Munson, you are one of the defendants in this case? A. Yes, sir.

Q. And you are a member of defendant Local 36?

A. I am.

Q. How long have you been a member?

A. I think since 1935 or '36. When it was started, anyway. [3219]

(Testimony of C. Lloyd Munson.)

Q. At that time it wasn't Local 36?

A. No, that is right.

Q. You belonged to the fishermen's organization that existed that preceded Local 36 since about 1935, is that right.

A. That is right.

Q. You started fishing about 1934, commercially?

A. That is right.

Q. What had you done prior to that?

A. I had owned a boat yard, a small boat repair yard.

Q. In 1934 did you buy a boat?

A. Yes, sir.

Q. And that was how big a boat?

A. Thirty-six feet.

Q. What size crew did you ordinarily carry on that boat?

A. Sometimes two, sometimes four men. Sometimes one besides myself, sometimes three besides myself.

Q. According to the kind of fish you were catching and according to the kind of gear you were using?

A. That is right.

Q. And you paid \$640 for that boat?

A. That is right.

Q. \$300 down and \$50 a month, is that right.

A. That is right.

Q. Did you continue to own and work on that boat from [3220] 1934 until 1942?

A. That is right.

Q. At that time you sold the boat, is that right?

A. That is right.

(Testimony of C. Lloyd Munson.)

The Court: What was the name of the boat?

The Witness: The Ben Hur.

Q. (By Mr. Margolis): During the period between 1934 and 1942 when you owned this boat, what kind of fish did you go after, market fish or cannery fish?

A. I think it was about 50-50. I fished swordfish, market fish, and some barracuda, some shark; also cannery fish, mackerel and albacore.

Q. After you sold your boat, what did you do?

A. I worked on a larger boat, commonly called a purse seiner.

Q. When you say you worked on the boat, do you mean that you worked on it on a share basis?

A. That is right.

Q. Did you have any interest in it? A. No.

Q. Did you make more money on the purse seiner or on your own boat?

Mr. Dixon: Object to that, your Honor, as immaterial.

The Court: Objection sustained. [3221]

Q. (By Mr. Margolis): Did you thereafter acquire another boat? A. I did.

Q. Did you build that boat yourself?

A. I did.

Q. When did you build it?

A. In the spring and early summer of 1945, spring and summer of '45.

Q. Did you build it alone, all by yourself?

A. My wife and I built it.

(Testimony of C. Lloyd Munson.)

Q. Incidentally, does your wife go fishing with you sometimes? A. Oh, yes.

Q. When you owned a boat did you spend all of your time fishing on that boat?

A. Either fishing or maintenance.

Q. How much of the year do you spend on maintenance of the boat and the gear?

A. It is rather involved, according to how much gear you use and what type of fishing you do. We probably spent three months of the year in building and rebuilding nets and equipment and maintenance of the boat, and probably nine months fishing.

Q. And the members of your crew spend practically no time on the maintenance of the boat, is that right? [3222]

A. Very little on the maintenance of the boat but they are required to build and repair the equipment.

The Court: That is, the nets?

The Witness: Yes, sir.

The Court: If you use nets.

The Witness: We used nets.

Q. (By Mr. Margolis): During the time that you have been fishing did you ice fish in your boat while you were out fishing? A. Oh, yes.

Q. Ever ice fish when you came back and hold it for a while? A. I tried it once.

Q. When was that?

A. I would say about 1939 or 1940, I believe.

Q. What happened?

(Testimony of C. Lloyd Munson.)

A. I gave them to the Salvation Army.

Q. You iced them for a while and then finally gave the fish to the Salvation Army, is that right?

A. That is right.

* * *

The Court: Cross-examine.

Mr. Dixon: No questions.

The Court: Step down.

* * *

BURT D. LACKYARD

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Margolis:

Q. Mr. Lackyard, you are one of the defendants in this case, are you not? A. I am.

Q. You are a commercial fisherman?

A. That is right.

Q. A member of Local 36?

A. That is right.

Q. You started fishing commercially in about 1942 is that correct [3224] A. Thereabouts.

Q. What did you do before that?

A. I was a painter.

Q. House painter? A. Yes.

Q. When you started fishing did you buy your own boat or did you work for somebody else?

A. No, I started to work for another fellow.

(Testimony of Burt D. Lackyard.)

Q. What kind of a boat?

A. Well, a jig boat in shark fishing.

Q. How big a boat was it?

A. Oh, 40 feet, I think.

Q. How large was the crew? A. Three.

Q. Did you subsequently buy your own boat?

A. I did.

Q. When was that?

A. That was about a year later, about May of 1943 would be about right.

Q. And this was a one-man boat, is that correct, a 26-foot boat? A. That is right.

Q. You paid \$450 for that boat and you still own it, is that correct? A. That is right.

Q. Now since you have been a commercial fisherman, what has been the nature of the fishing operations, that is, have you fished cannery fish or fresh market fish or both?

A. Well, I have fished mostly cannery fish. I have never done too well with fresh fish, mostly due to——

Mr. Rubin: Just a moment, if your Honor please. The question has been answered. The rest of it calls for a conclusion.

The Court: Go ahead. It calls for a conclusion. Go ahead with your next question. Or he started to express his conclusion, rather.

Q. (By Mr. Margolis): When you say you have done very little fresh market fishing, I wonder if you could give us a little bit better idea of how much you have done. Have you done any fresh market fishing since 1942?

(Testimony of Burt D. Lackyard.)

A. I done a little bit in 1945, approximately a month; in 1946 I done none.

Q. Have you done any since 1946?

A. I have done none since '46.

Q. All of your fishing has been cannery fishing?

A. That is right.

Q. When you did go fishing for fresh market fish, did you run into any problems with regard to the disposal of your fish? [3226]

Mr. Rubin: Just a moment. That calls for a conclusion and opinion of the witness. The question is ambiguous and uncertain.

Mr. Margolis: I will withdraw the question.

Q. Where did you sell your fish when you went fishing for fresh market fish?

A. In Newport I generally sold to who I could. I had no regular spot inasmuch as I was a new-comer, but mostly I sold to Bayside.

Q. Did you go fishing regularly and sell fish regularly during the time that you were fishing fresh market fish? A. No, I did not.

Q. What happened?

A. I couldn't always sell the fish.

Q. So you didn't go fishing, is that right.

A. That is right.

Mr. Rubin: Just a moment. We move to strike the answer on the ground it calls for a conclusion and opinion of the witness. He can testify as to whether he sold it. Whether he could or not calls for his conclusion.

The Court: Yes, that is right.

(Testimony of Burt D. Lackyard.)

Q. Did you have any occasion when you offered fish for sale to dealers and they refused to accept it at all? A. Yes.

Q. Did that happen once or more than once?

A. Well, that happened quite often.

Q. Now in addition to your fishing activities, have you engaged since 1942 in any other kind of work?

A. Yes, I have found it necessary to work on the beach.

Mr. Rubin: Just a moment. We object to the question on the ground it is immaterial.

The Court: Objection sustained, the answer is stricken—unless it relates to the union activities.

Mr. Margolis: Well, it relates to what this man did to make a living.

The Court: Then the objection is sustained and the answer is stricken.

Q. (By Mr. Margolis): When you were fishing fresh market fish on your own boat, did you also work on other boats? A. Yes.

Q. Can you tell us what other boats you worked on?

A. Well, I worked on sport fishing boats and one other [3228] boat, Roy Barry, which was a commercial boat, a jig boat at that time.

Q. Was that work done over weekends, is that right? A. Yes, on the sport boats.

Q. And that was in addition to what little fresh market fishing you did? A. That is right.

(Testimony of Burt D. Lackyard.)

The Court: That altogether was only a month since you have engaged in the fishing industry in 1942?

The Witness: Altogether a month?

The Court: I understand that you have only fished fresh market fish for one month since you started in the fishing industry.

The Witness: I fished a little in 1943 and '44 and '45.

The Court: One month in '45?

The Witness: Well, it was approximately a month in '45.

The Court: All right. And not otherwise since?

The Witness: I haven't fished since only—well, I have fished since I have been up here a little, but not to do any good. [3229]

Q. (By Mr. Margolis): What fish did you sell—did you sell any fresh market fish during the period that OPA was in effect?

A. That is when I sold most of my fish.

Q. Did you always get OPA prices for it?

Mr. Rubin: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Q. (By Mr. Margolis): When you went to sell your fish, will you tell us how the price for the fish was set?

Mr. Rubin: Same objection, your Honor.

The Court: Objection sustained.

Q. (By Mr. Margolis): Will you tell us what

(Testimony of Burt D. Lackyard.)

practice you followed when you brought in a load of fresh fish with regard to disposing of the fish?

A. Well, generally go to the first market which I favored, Bayside, and if he would take my fish, O. K.; if not, I would go to another one, until I sold my fish.

Q. When you say "if he would take" your fish, what happened when you went to see him? What was the practice?

A. "Don't want any more fish. Can't take them."

Q. When he did take the fish what was the practice with regard to the sale of the fish?

A. I says, "How much are you paying for fish?" Whatever he said is what I took. [3230]

* * *

Cross-Examination

By Mr. Dixon:

Q. Mr. Lackyard, it is a fact, is it not, that when you went out fish in in your own boat that no one told you when to go fishing? A. Not directly.

Q. Did anyone tell you where to go fishing when you decided to go fishing in your own boat for fresh market fish? A. Not directly.

Q. That was a matter entirely within your own choice, was it, Mr. Lackyard, as to where you would go fishing in your own boat?

A. I wouldn't say no nor yes. We went where the fish were.

Q. I understand. That is all.

* * *

ARTHUR D. HILL

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Margolis:

Q. Mr. Hill, you are one of the defendants in this case? A. I am.

Q. You are a member of Local 36?

A. Yes.

Q. You are a commercial fisherman, are you not? A. Yes, sir.

Q. When did you start fishing as a fisherman?

A. 1936, about March.

Q. And where was that? A. San Pedro.

Q. Did you continue to fish at San Pedro until the present time?

A. I continued fishing at San Pedro until the port was partially closed in the war in 1942, and then I moved to Newport Beach.

Q. And have you remained in Newport Beach since then? A. I have.

Q. You are there working as a commercial fisherman now, is that correct? A. Yes, sir.

Q. When you started commercial fishing in 1936 did you [3232] obtain a boat?

A. I built one up, yes, sir.

Q. You built a boat from scratch, or did you buy an old boat and built it?

(Testimony of Arthur D. Hill.)

A. I got an old hull that had been discarded, and then I put an automobile motor in it and built up my own boat.

Q. The total cost to you was about \$500, is that correct?

A. Approximately, yes; mostly for the motor.

Q. Did you sell that boat in 1942?

A. I did.

Q. By the way, you sold it for \$450, is that right? A. That's right.

Q. This boat you bought in 1936 and sold in 1942, was that a one-man boat?

A. Yes, it was a one-man boat.

Q. What kind of fish did you go after?

A. I fished a little mackerel with that boat, and I also trolled barracuda and albacore.

* * *

Q. (By Mr. Margolis): Did you fish continuously during [3233] 1936 to 1942? A. No.

Q. During what periods didn't you fish?

A. I didn't fish in the wintertime. My boat wasn't seaworthy enough to fish in wintertime and it wouldn't haul enough of a load of mackerel.

* * *

Q. (By Mr. Margolis): The rest of the year during that period did you fish continuously?

A. No, I didn't fish continuously the year around until I got my other boat in 1942. Then I was able to fish the year around.

(Testimony of Arthur D. Hill.)

Q. Aside from the period of approximately three months, or wintertime, when you didn't fish, did you fish continuously the rest of the year?

A. Yes, I fished in that part, yes.

Q. Did you buy another boat in 1942?

A. I did.

Q. Also a one-man boat? A. That's right.

Q. A 30-foot boat? A. A 30-foot boat.

Q. What did you pay for that boat?

A. \$1,000. [3234]

Q. Do you still own that boat?

A. I do.

Q. What kind of fishing have you done since 1942?

A. Mackerel and albacore and barracuda.

Q. Where have you sold that fish?

A. Well, the fresh fish I sold to Bayside up until about two years ago, then I sold from then on to the Western Cannery on the fresh fish. On the cannery fish I sold most of that to Western Cannery, and then I also sold French Sardine in San Diego, and then to Van Camp.

Q. Which of the fish that you have mentioned is fresh fish and which of it is cannery fish?

A. Barracuda is fresh fish, and then there was some sold I believe in 1943 that was canned, just a very short period there, and then the albacore that I sold to Bayside, he sold the bulk of the fish to the canner, and then he retained what he wanted for the fresh fish market. Then the mackerel, of course, was all cannery fish, as far as I knew.

(Testimony of Arthur D. Hill.)

Q. All right. Since you have owned this boat, have you spent all of your time that you spend fishing on this boat, or have you also worked on other boats?

A. I work on other boats, because my boat wasn't——

* * *

Q. (By Mr. Margolis): Did your boat have equipment for all kinds of fishing?

A. No.

Q. Were there periods when the only kind of fish that was available was fish for which your boat did not have equipment? A. That's right.

Q. What did you do during those periods?

A. I fished on other larger boats that had facilities.

Q. When you fished on those other boats did you fish on a share basis? A. I did.

The Court: What kind of fish could they catch that you couldn't catch?

The Witness: There are times, your Honor, that you can't catch albacore jigging, that is, they slow down on jigs but you can catch them better on bait, then I would go on a bait boat. Then, halibut, you can't catch halibut in this country on hook and line, so you have to have trammel-nets, so I would fish in trammel-net boats. And then shark fishing on hook and line has been very poor the last three or four [3236] years, so I fished on shark boats with shark nets.

The Court: Shark nets?

(Testimony of Arthur D. Hill.)

The Witness: That's right, gill nets, they swim into the net and get caught.

Q. (By Mr. Margolis): That is equipment you never had on your boat?

A. I haven't that equipment. My boat is too small.

* * *

Q. (By Mr. Margolis): Do you spend part of the time working on your own boat, maintaining it?

A. Yes.

Q. About how much time?

A. About two months.

Q. That is continuously, two months straight?

A. Not two months in an exact stretch. Like several weeks ago I was on the ways, I think three or four days in that period. Then sometimes I will spend as much as six weeks [3237] in making changes and painting and cleaning and overhauling the motors. I don't know, it is just an endless thing. I can't tell you all. But it takes approximately two months out of the season to maintain the boat.

Q. When you go fishing for market fish do you contact a dealer before you go fishing with regard to the disposal of your expected catch?

A. Yes.

Q. And will you tell us what your practice and custom is in that regard?

A. Well, I go to a dealer, generally of course after I get the catch, and deal with the dealer. I have one dealer I go to. We try generally to work with one dealer. I go down and ask him if he will

(Testimony of Arthur D. Hill.)

take fish tomorrow, that is, if I am just starting. If I am not starting, when I deliver my fish I generally ask him if he will take the next trip. [3238]

Q. Do you have any discussion of price?

A. No, the price is set when I come in.

* * *

Q. Tell us what you actually do, what your custom is.

A. I take the market price as paid for the fish when I come in.

Q. What do you mean by the market price?

A. Well, I was fishing last Thursday before I came to court Friday and the price was 13, so yesterday I went out fishing and I come in and the price was 10, so I took 10 for my barracuda cleaned yesterday.

Q. But you go to the dealer and he tells you what the price is, is that right?

A. That is right.

Mr. Rubin: That is objected to as calling for a conclusion, if your Honor please.

The Court: Overruled. It is asked and answered. It is in the record a hundred different ways and times; once more isn't going to hurt any.

Q. (By Mr. Margolis): You were in court when Mr. Naylor testified concerning an incident when he says that he paid you 29 cents a pound for barracuda and later on he found that the market was 12½ cents? A. I do.

Q. This occurred about four years ago?

A. That is right.

(Testimony of Arthur D. Hill.)

Q. Do you remember that incident?

A. I do.

Q. Will you tell us what happened at that time?

A. Well, I always used to rather pride myself in getting the first fish of the season, and I heard there was fish up in Santa Monica Bay, just a very few fish——

Q. You ordinarily go fishing in Santa Monica Bay, do you?

A. Not normally. At that time of the year sometimes I take ice and go up to Santa Monica Bay.

So I told George if he would pay me the Santa Monica price——

Q. You told who? A. George Naylor.

Q. All right.

A. ——that if he would pay me the Santa Monica price [3240] I would bring in the fish, which would be the first load of fish in Newport. There had been no fish up to then.

And I went up and I was up there almost a week. I only had 400 pounds when I got back, and so we had an argument about the price. He did not want to pay me the Santa Monica price, but finally he did, and the price he paid was 27, not 29, because I looked that up. And so he paid me 27 cents, but there was a big load of fish coming in from Mexico——

Q. Before you go on, he paid you the 27 cents and you received approximately a hundred dollars, is that right? A. That is right.

Q. Now what were your expenses for that trip?

* * *

(Testimony of Arthur D. Hill.)

Mr. Dixon: Objected to as immaterial.

The Court: Objection sustained.

Q. (By Mr. Margolis): Did you have extra expenses to that trip because of the fact you had to go to Santa Monica to get the fish? [3241]

A. I did.

Mr. Dixon: Same objection.

The Court: Same ruling. The jury are instructed to disregard the answer of the witness, which is stricken from the record.

Q. (By Mr. Margolis): What happened then with regard to barracuda coming in?

A. Well, there was a load of 30 ton came in from Mexico to San Diego on the following morning. I sold the fish that Saturday, and on the following Monday there was 30 ton coming in; and there also came in news that there was two boats out fishing that had about 20 tons of fish on board. So on the following Monday the price at San Diego went to 4 cents to the fishermen.

Q. So that the fish dropped from 28 cents to 4 cents in a period of a couple of days?

A. 27 cents.

Q. 27 cents to 4 cents?

A. Yes, on Monday.

The Court: Is this the barracuda season now?

The Witness: Yes.

The Court: The beginning of it?

The Witness: Yes, sir. It hasn't really got started yet, sir. [3242]

The Court: But it runs how long?

(Testimony of Arthur D. Hill.)

The Witness: It will run up until the end of August.

The Court: The barracuda season is longer than any other season, that is, of the fresh fish?

The Witness: No, sir. Really mackerel is the longest season.

The Court: But that is cannery fish?

The Witness: No, they fish mackerel for the fresh fish market too, sir.

The Court: The barracuda are not in these waters in the winter, is that right?

The Witness: That is right, your Honor. You see, they come in here to spawn, just like the salmon come up the river, and they come up here and spawn and when they are through spawning, in about September, that is, the fish will just drop off like that at the end of August. Then there is a few local fish that seem to go up around Santa Barbara and up through the channel there. I guess they go up the wrong way and they hang around all winter, but not enough to make good fishing.

* * *

Q. Mr. Naylor testified that he never paid less than the ceiling price, the ceiling price to the fishermen for fish when he bought from the fishermen during the period that [3243] OPA prices were in effect. Did you sell fish to Mr. Naylor during the period of OPA prices? A. I did.

Q. Did you always receive the ceiling price?

A. That I can't recall. I just can't recall it.

(Testimony of Arthur D. Hill.)

Q. Now Mr. Naylor also testified that he doesn't give direction to the fishermen to bring fish in to him, as to the species of fish for which they can go fishing and that he does not give such directions to the boats which he owns and controls. Have you ever worked on a boat which Mr. Naylor owned or controlled? A. I have.

Q. What was the name of that boat?

A. The Tropic Bird.

Q. How big a boat was that?

A. It was about, as I remember, a 38-foot, 40-foot boat.

Q. When did you fish on that boat?

A. I believe it was in 1944, if I remember.

Q. On a share basis? A. That is right.

Q. Will you tell us what the practice was with regard to the determination as to what species of fish you should go after?

A. Well, on that boat—of course we couldn't catch [3244] anything in any quantity except halibut because all we had was trammel nets, which is the customary gear for halibut.

Q. Who determined what gear was on the boat?

A. That was all the gear we had, was the trammel net.

Q. That was Mr. Naylor's gear, wasn't it?

A. That is right.

Q. That is all the gear he gave you?

A. That is right.

* * *

(Testimony of Arthur D. Hill.)

Q. During the time that you worked for Naylor on Naylor's boat, was the fish that was caught on that boat delivered anywhere except to Naylor?

A. No place except Naylor's; no. [3245]

* * *

Q. When you were fishing on the Tropic Bird, were you required to do anything else besides fish?

A. Yes.

Q. What else were you required to do?

A. We were required to maintain the boat and, that is, to keep it in condition, and also to maintain the nets.

* * *

Q. Let me ask you this question: Did you have to wait until after you had repaired the nets before you were paid? A. Yes.

Q. How long would that be sometimes?

Mr. Rubin: Objected to on the same ground.

The Court: Objection sustained. [3246]

* * *

Cross-Examination

By Mr. Dixon:

Q. Mr. Hill, how many times did you sail on the Tropic Bird?

A. I couldn't tell you the number of trips.

Q. Approximately how many times?

A. Well, I guess I was employed with the boat in repairing the nets and everything, about two months altogether.

Q. So during the entire period of time that you testified you have been a commercial fisherman

(Testimony of Arthur D. Hill.)

you were on the Tropic Bird during a period of approximately two months during that entire time, is that correct?

A. Well, I was on other boats besides that.

Q. I understand. I am talking now about the Tropic Bird.

A. Yes, that is the Tropic Bird.

Q. That is the boat you described as being one of Mr. Naylor's boats?

A. That is right.

Q. Who was the captain of that boat?

A. Andy Brocket.

Q. How many were in the crew of that boat besides yourself?

A. Andy Brocket and a fellow named Ed—I don't [3247] remember his last name—and myself.

Q. Now in addition to this fishing that you did on the Tropic Bird, I believed you testified that you owned your own boat, is that correct?

A. That is correct.

Q. And at other times you went out on other boats?

A. That is right.

Q. Other than your own, is that true?

A. That is right.

* * *

Q. It is a fact, is it not, Mr. Hill, that when you went fishing in your own boat you decided when you would go fishing, is that a fact?

A. Well, the weather and then whether I could sell the fish. Many things decided whether I could go fishing.

Q. That was a thing that you decided, was it not, Mr. Hill?

(Testimony of Arthur D. Hill.)

A. No. I couldn't decide that.

Q. Who decided for you then when you went out in your own boat, if anyone, to go fishing for fresh market fish?

A. Well, if the dealer would agree to take my fish, and then the weather, if that was all right, and then I thought I could catch fish, why then of course finally I would go.

Q. You were the only one, were you not, who decided whether you would or would not go fishing, Mr. Hill?

A. Well, I couldn't go fishing if I couldn't sell the fish.

Q. Well, you testified that you had some conversations with dealers before you went out fishing and that they would not give you any price for the fish that you might or might not catch.

A. That is right. [3249]

Q. That is a fact, is it not?

A. That is right; yes.

Q. So it is a fact that when you went out fishing you went out with knowledge of that fact?

A. That is right, yes, I went out with that knowledge.

Q. And it is a fact that there are other dealers at Newport Beach besides the Bayside Market, are there not?

A. That is right.

* * *

(The jury retired from the courtroom at 11:05 o'clock a.m.)

* * *

Mr. Margolis: I have some offers of proof in addition to that which I am ready with.

The Court: All right. [3252]

* * *

OFFERS OF PROOF

Mr. Margolis: If your Honor please, in this case, as in others, because of your Honor's previous rulings I did not ask what would ordinarily be the necessary foundation questions for an offer of proof, and I assume that as in other situations——

Mr. Rubin: We will make no objection for the purpose of this offer, Mr. Margolis, as to foundation.

Mr. Margolis: With respect to the witness Lloyd Munson, if your Honor please, we offer to prove if we were allowed to ask appropriate questions and he were allowed to answer those questions, that the witness would testify as follows: That the most money he has ever made in any one year since he started fishing was in 1946 when he netted a total of \$2700; that his average during that period, the period of his fishing, we don't have the exact figures, is well under \$2,000, probably closer to \$1500 than to \$2,000; that he lived in a home which he purchased for the total price of \$2500, and on which he pays \$20 a month; that he doesn't ice fish and hold it as a fisherman, because it is too expensive, it ties up his boat; that he doesn't have any money reserves so that he can hold fish and sell it at a time when the market is right, he has to dispose of it in order to get other money to continue living,

to go out and to fish again, and again sell that fish in order to live, therefore he cannot tie up his boat and cannot tie up his money by storing the fish; that he does not ice fish with the ice company because it requires a truck and a place to unload, and he doesn't have either, besides there is the question of obtaining room, which is a difficult one, the expense of storage, and finally that he has to turn around and end up by selling the fish to the same dealer to whom he would have sold it in the first place, and there is therefore no advantage to him in holding fish. The only advantage in holding fish is to the dealer who waits for the right kind of a retail market, or who makes the price on the retail market by withholding the fish from sale.

With regard to the witness Arthur Hill, we offer to prove as follows: That he does not own his own home; that he rents a place for \$17.50 a month; that the last time that he went fishing was on a share basis—that is, the last time prior to the time the trial began—was on a share basis and for a two weeks period made \$21.50. He took the place of a man who had given up fishing because of a heart ailment resulting from overwork. The last time he fished on his own boat——

I want to state these statements with regard to the last time he fished were statements about what occurred the last time prior to the trial, beginning of the trial.

The last time he fished on his own boat was in November that he was out about a week, got caught in a storm, lost his anchor, lost about \$30 on ice and

groceries, got no fish, and the damages to his boat ran about an additional \$30. He was out about three days without any sleep. The next to his last trip on his own boat he was out for a week and cleared about \$50 above expenses. In 1943 his net earnings were approximately \$2500. In 1944——

The Court: You are still talking about Hill?

Mr. Margolis: Yes. In 1944, \$750; in 1945, \$725; in 1946, \$1500. That he has at times checked the retail market when the price of fish——

The Court: This hasn't got anything to do with it, but why didn't these men go down in the war plants during the war years instead of being satisfied with \$50 or \$70 a month?

Mr. Margolis: A lot of them did that. Many of them did.

The Court: It is not material, counsel, at all.

Mr. Margolis: Mr. Hill tells me that they weren't allowed to go to the war plants. They were given certificates of availability. The government needed fish, felt that fish was necessary, and your Honor will remember a man couldn't go wherever he wanted to work; he had to have a certificate of availability, and a fisherman was not given a certificate of availability, except men who had very high skills in some other particular field where there was a greater demand for manpower, and those men did go. As to those men who didn't have specially high skills they were tied to their fishing boats.

That he has checked the retail price of fish, barracuda, and he has seen the price of barracuda, as

in the one instance, dropped from 28 cents to 4 cents, and in other instances from 16 cents to 2 cents in a single day; that he has checked retail prices during that period and found the retail prices running 50 cents and over without any drop in retail prices at all, at the time there was this tremendous drop to the fishermen. He doesn't ice fish and hold it, and his testimony with regard to the reasons would be the same as the testimony of Mr. Munson as to the reasons why he doesn't ice fish. In addition, he adds that fish deteriorate if iced in the boat and can only be held in the boat for a limited period. Some species cannot be iced in the boat at all.

We also offer to prove through this witness that he is thoroughly familiar with the customs and practices at Newport Beach; that he knows that on Naylor's boats all of the fish caught is delivered to Naylor and to nobody else.

By "Naylor's boats" I mean boats owned or operated by Naylor.

The Court: I understand.

Mr. Margolis: We offer to prove through the witness Burt D. Lackyard the following: He rents a home for \$20.00 a month. His wife works as a telephone operator. His earnings in 1944 were about \$400; in 1945, \$685; in 1946, \$662; and that in computing these earnings he has allowed nothing for depreciation on his boat. He has never, of course, been able to carry insurance. That none of the fishermen carry insurance on their boats because they can't afford it, none of the small boat fisher-

men. In 1944 and '43 his net income was about \$400 each year. In 1942 he did not start fishing until August and has no record of his earnings from fishing for that year, but it wouldn't be over \$100.

That completes our offer of proof.

* * *

Mr. Rubin: As to the offer just made by counsel, the government objects to each and every part thereof on the ground that it is immaterial.

The Court: Objection sustained. All right, Judge Kenny.

Mr. Kenny: At this time I would like to offer for identification Defendants' Exhibit next in order, civil action No. 1772-B, the complaint and the decree, both of which were filed and entered on September 5, 1941. The title of the case is United States v. San Pedro Fish Exchange.

In that connection I call your Honor's attention——

The Court: San Pedro Fish Exchange and others?

Mr. Kenny: Et al, yes, and other.

I call your attention to the discussion that took place at page 628 of the transcript. At that time—probably that is the easiest way of looking at that.

(Transcript passed to the court.)

Mr. Rubin: I understand this is being offered for identification, if I understand Judge Kenny correctly.

Mr. Kenny: Yes.

The Court: Only for identification?

Mr. Kenny: I suppose we would offer it in the presence of the jury, but we will have the discussion about it now.

The Court: It will be marked for identification, and you will offer it in evidence?

Mr. Kenny: That's right.

The Clerk: HH.

(The document referred to was marked Defendants' Exhibit HH, for identification.)

The Court: It will be in the nature of an offer of proof?

Mr. Kenny: That's right.

Mr. Rubin: The government at this time objects on the ground of incompetency, irrelevancy, and immateriality.

The Court: You were making some point in the testimony?

Mr. Kenny: Yes. Here is what we are up against, because the court remarked at the time we were discussing with Vitalich his association in the San Pedro Fish Exchange, we were examining him on his membership in the San Pedro Fish Exchange, that was a topic that had been brought out originally in the examination of Mr. Ross——

Mr. Rubin: On cross examination.

Mr. Kenny: Our problem is what the court said. The court said it was remote. The association was dissolved, according to the testimony, in 1939. Now that simply isn't so. We didn't know it at the time, and the court didn't know it, and the government didn't tell him.

The Court: That is what the testimony was.

Mr. Kenny: That is right, and the government sat moot, and it was only my research that was able to turn the matter up that they had brought an additional suit two years later, to-wit, in September, 1941.

The Court: The only ground of admissibility, as I see that, Judge Kenny, is impeachment of the witness who testified that it was dissolved in 1939. What witness was that?

Mr. Margolis: Mr. Ross.

Mr. Rubin: That was Mr. Ross, and they were referring to the F. T. C. matter, your Honor, and not an antitrust matter.

Mr. Kenny: That is correct. We were all left to believe that everything had been cleaned up by the F. T. C. matter in 1939. The government sat silent. It was only when I saw Senator O'Mahoney's report and have been able to see these cases that I discovered they had filed a case in 1941.

Mr. Rubin: I think the implication of Judge Kenny's remarks in the record is certainly uncalled for and forms no remarks in this argument or discussion.

Mr. Margolis: Didn't you sit silent?

Mr. Rubin: We sat silent a lot of times when you were examining. That doesn't mean we have to get up and educate the defendants on something that is immaterial and remote.

The Court: If they regard it as immaterial it isn't necessary to——

Mr. Kenny: They let your Honor say, without attempting to correct him, and tell the jury that the association was dissolved according to the testimony in 1939.

Mr. Rubin: As to the F. T. C. matter.

The Court: I subsequently held that the matter of the Fish Exchange, whether it existed or didn't exist, was completely immaterial.

Mr. Kenny: No, your Honor. You held it was remote.

The Court: Yes, remote and——

Mr. Kenny: It is two years less remote in 1941 than it is in 1939.

The Court: It is still remote.

Mr. Margolis: It goes to impeachment, your Honor.

The Court: If I can find the testimony of Mr. Ross in the record where he says—or whoever it was that did say it—that it was dissolved in 1939, then I can pass on whether or not it is admissible for impeachment purposes.

Mr. Rubin: I think page 236, would that help you?

Mr. Kenny: That's right, about 238. By the way, Mr. Ross also stated at page 480 of the record that he was going to send a copy of that F. T. C. order to the Department of Justice. We would like to have that now.

The Court: I think he came back later on the stand and said he couldn't find it; that he would look for it.

Mr. Kenny: Then he said he would mail it to the government. I wonder if the government has received it.

Mr. Dixon: Yes, your Honor, the government has it if it is material, and we are very glad to make it available.

The Court: I suppose they want it to make an offer of proof.

I think this complaint and decree might be admissible, because in the testimony of Mr. Ross, in his direct, he testified that when Mr. Zafran presented him the contract that he would not and could not sign it, that is, whether it was on that particular occasion or subsequent date, he would not and could not sign it because they had some, either restraint or something with the federal government.

On cross examination when that matter was gone into by Mr. Garrett an objection was made and I permitted it at that time and I see on page 235 my ruling:

“No, I think counsel opened it up on direct examination, and the witness has assigned it as one of the reasons why he could not or would not sign the contract. I think, therefore, it is material.”

Now, ordinarily why Ross would not or could not sign the contract would not be material or admissible except that the matter went into evidence on the direct examination of Ross. I don't know how that whole matter can be segregated and sifted out and strained from the record, because it is in there now, and it was put in subsequently by other witnesses

on direct examination from the government as to what they had said to Zafran or to somebody else as to why they could not sign the contract.

Mr. Rubin: If your Honor please, I don't recall that the government opened it up on direct with respect to Mr. Ross. If your Honor has the reference——

The Court: I see here, page 235:

“No, I think counsel opened it up on direct examination, and the witness has assigned it as one of the reasons why he could not or would not sign the contract.”

Mr. Rubin: As to Mr. Zafran?

The Court: When Zafran presented the contract to Ross, Ross told him he would not sign the contract either at that particular time or subsequently, because——

Mr. Rubin: Of the cease and desist order. It has nothing to do with this particular document, if your Honor please. All of the testimony until just the other day, all the testimony in the record had to do with the F. T. C. matter.

Mr. Kenny: That is right.

Mr. Rubin: It has nothing whatever to do with this civil action and this civil complaint.

The Court: Just a minute.

Mr. Rubin: Mr. Ross is a party to the F. T. C. matter; he is not a party to the civil action, not named.

The Court: Is Mr. Ross a party to that?

Mr. Margolis: All that appears is:

“The defendant San Pedro Fish Exchange is a voluntary unincorporated association, with its principal office in the Harbor District of the City of Los Angeles, California, at a place commonly known as San Pedro. The membership of San Pedro Fish Exchange is composed of numerous dealers and wholesalers having places of business at San Pedro.”

It doesn't spell out who those are, but Mr. Ross has testified that he was a member of the San Pedro Fish Exchange.

The Court: Up until the time of the cease and desist order.

Mr. Margolis: He said after that there was no San Pedro Fish Exchange. He said it disappeared. He said there just wasn't any more.

Mr. Rubin: With respect to impeachment, your Honor, if they were to introduce evidence to show that Mr. Ross was in error with respect to the F. T. C. order, that might go to impeachment. There is no testimony in this record whatsoever from anybody as to the antitrust case filed in 1941, none whatsoever. And, furthermore, this is probably a technical objection, but I think it is good, this is a consent decree, and my understanding of the law is that there is no admission that is obtainable when defendants in an antitrust suit file a consent decree, and if I am not mistaken, by the statute of the Sherman Act itself. That is why people sign consent decrees. There is no implication derived therefrom for the purpose of treble damages.

The Court: This is not a treble damage action. The defendants keep saying they wish it were.

Mr. Rubin: I believe it states "in any subsequent proceeding," and this is certainly a proceeding, and we submit—

Mr. Margolis: As against the parties that deals with.

Mr. Rubin: It is used in this case as—it is endeavored to be used in this case as testimony against Ross, as impeachment. We submit, if your Honor please, there is nothing in the record concerning this particular complaint and consent decree. They are endeavoring to impeach a man who did not testify concerning the subject-matter.

Mr. Margolis: He said the San Pedro Fish Exchange went out of existence in 1939.

Mr. Rubin: This decree, we submit that the matters contained therein would have an effect upon this jury that goes far beyond anything—the purpose for which it is being offered. There are enough collateral matters in the case now.

The Court: The jury has to decide the effect and weight of it. If it were me and it were in the evidence, I don't think it makes any difference.

Mr. Rubin: I don't think so either, if your Honor please, but it will be in the record, and there are certain stipulations and findings which will be subject, undoubtedly, to argument by counsel to the jury which will go far beyond the purpose of testing the credibility of Mr. Ross. That is the real reason why we object to it.

The Court: I think that I will look through Mr. Ross' testimony. That is Volumes I and II, isn't it, Mr. Clerk, I, II and III?

We will recess until 2:00 o'clock.

* * *

The Court: I would expect that.

Mr. Rubin: The first mention, if your Honor please, of the cease and desist order appears, according to my research, on page 113 of the record.

The Court: 114 I have it marked.

Mr. Rubin: Well, the question starts at the bottom of 113, if your Honor please:

"Q. What did you tell Mr. Zafran when he handed you this document?

"A. That I could not sign that contract.

"Q. Did you say anything else to him?

"A. For the reason that at one time we were given, my company, the American Fisheries Company, was given a cease and desist order by the Federal Trade Commission in the matter of trying to fix prices.

"Q. How long ago was that?

"A. Between the years 1938 to about 1940."

That is the only matter on direct that the government touched upon in so far as Mr. Ross is concerned.

Mr. DiMassa, you will recall, did not receive the contract personally. It was received by Mr. Demeglio, his partner, and that reference is on page 990 of the transcript.

I might state there is no reference there at all to the cease and desist order.

The Court: Well, neither Mr. Ross nor Mr. De-meglio nor any of the parties who have been called as witnesses in this case are or were parties to the civil antitrust decee 1772-B. Those parties are San Pedro Fish Exchange, Anthony B. Jaconi, Yoshitura Kamiya, M. N. Blumenthal, Hugh Reves, A. H. Finch, Elmo C. Jack, and J. J. Camillo.

In checking my witness list I don't find that any of them were called.

Mr. Kenny: Your Honor, I might support the foundation——

The Court: Were any of them called? Were any of these parties called as witnesses?

Mr. Margolis: No.

Mr. Kenny: I was just going to support the foundation by offering, for identification, as II, the cease and desist order of the Federal Trade Commission, Docket 3739, and call your Honor's attention to the fact that in that order is recited that the American Fisheries Corporation, Mr. Ross' corporation, is a member of the San Pedro Fish Exchange.

Mr. Rubin: Of course that isn't the document we are considering at this time. The government did not open the matter on direct, if your Honor please, to this particular proceeding.

Mr. Kenny: I also have two or three citations to the record. On page 281, two questions by Mr. Garrett. This is addressed to Mr. Ross.

“Q. When did the Fish Dealers Exchange go out of existence?

"A. Somewhere between the years 1938 and 1940.

"Q. And thereafter did the members continue to maintain uniform prices for the product they bought?"

And after objections the answer to that question comes on page 283: "The answer is no, sir."

Then at page——

The Court: Wait a minute. When this gets up on appeal they won't know whether Rubin is testifying, the court is testifying, Kenny is testifying, Margolis is testifying, or Garrett is testifying.

All right.

Mr. Kenny: Then on page 285, lines 21 and 22 and 23, Mr. Garrett says:

"Q. Who represented the Exchange?

"A. You mean prior to 1940?

"Q. While it was in existence.

"A. I believe it was Clifton Hix, Attorney."

Then on page—— I did have some reference on page 238. There is a reference to the F. T. C. order, but I don't think that is important.

I think the most important testimony bearing on our argument for the admissibility is the language at page 283, those two questions.

The Court: Let me examine the cease and desist order.

Is that all of your record references?

Mr. Kenny: No; I have two more in the examination of Mr. Vitalich, and that is at page 628 and

629. That, of course, is the part where your Honor by this time had also been misled and your Honor stated in the presence of the jury:

“The Association was dissolved, according to the testimony, in 1939.”

And that, of course, was substantially what Mr. Ross had led you to believe in his answers to Mr. Garrett's questions.

Then, if you will notice Mr. Andersen expressing skepticism said, “The organization was dissolved, may it please the court, according to the testimony.”

And you said, “That is the only thing I have to go on here.

And Anderson said, “According to the testimony. We don't believe it is dissolved.”

And then the last citation I will give your Honor is on page 629 at lines 17 to 20. There Mr. Anderson says:

“Q. As I understand it, the old association was dissolved before 1939 or 1940 when you were served with the cease and desist order, is that correct?”

And Vitalich says: “That's right.”

So we have got two of these government witnesses assuring the court that their organization was dissolved in 1939 or '40, and then we have the government's own action in 1941 bringing a civil action against the San Pedro Fish Exchange.

The Court: Let me examine the cease and desist order.

Mr. Kenny: Did I hand that up to your Honor?

The Court: Yes, thank you, I have it.

I have examined the cease and desist order. Now, you handed me up II; do you wish to make your record on that?

Mr. Kenny: I wish to offer that, I mean, have it marked for identification at this time.

The Court: With the intention of offering it?

Mr. Kenny: With the intention of offering that in evidence, too.

(The document referred to was marked Defendants' Exhibit II, for identification.)

The Court: The two documents HH and II present a little bit of a puzzle to me. It seems to me that they tend to corroborate the government's case. I don't know whether the defendants should offer them, and I don't know why the government should object, but the government does object. They have a right to object. I think under the law that they are both immaterial, except for one thing, and that is to establish the truth or falsity of the testimony of the witness Rose.

Mr. Kenny: And Vitalich, your Honor. Vitalich is the man who said at page 629——

The Court: Yes, that the association had been dissolved.

Mr. Rubin: Vitalich isn't a party to that consent decree.

The Court: He does not appear in the consent decree to have been alleged to be a member.

Mr. Margolis: But they said the association was dissolved.

Mr. Dixon: It may well have been, your Honor.

The Court: That association may have been dissolved. This may have been another one. There isn't anything in these two things that shows them to be the same association.

Mr. Margolis: I think just as there is the presumption, your Honor, that a person having a certain name is that person, so I think that here you have an association of wholesale dealers in San Pedro with exactly the same name. I think that maybe the government can come in and show it isn't the same association, and I would like to know whether the government represents that it is not the same association. I don't think the government should sit back here and say maybe it isn't the same association. The government knows whether it is or not.

Mr Rubin: As a matter of fact, I don't know, either Mr. Dixon or myself. We weren't in the division at the time of either of those proceedings.

The Court: In that connection, I think perhaps that the government should not—I think it would be quite inappropriate in connection with their oath to enforce the law to make an assertion at this time if they don't know. In other words, they have to hold themselves free to perhaps prosecute somebody else. If these are two different associations, they may want to hold themselves free to prosecute the members of the San Pedro Fish Exchange, which they should do, and not at this time make a concession or admission which might be taken as a concession on their part that somebody has not violated the law, when tomorrow they may discover that they have.

They may desire in pursuance of their duties to institute the same kind of prosecution against them that they have now and are in this case instituting against these defendants.

Mr. Margolis: We have two points, your Honor. One is the government's record will show it is certainly the same association. The second and more important——

The Court: The records may or may not. Those things are questions of fact.

Mr. Margolis: Here, your Honor, is the situation: There is an association with exactly the same name in exactly the same area composed of exactly the same type of people, same sort of dealers——

The Court: No, it doesn't appear to be, Mr. Margolis. I was under the impression that it was until I read this order to cease and desist. The consent decree seems to be aimed at a group of people who are or were superimposed upon the fish dealers as fish brokers. Jaconi and Yoshitura Kamiya, they are dealers and wholesalers; Blumenthal is a broker in Los Angeles; somebody is a seafood brokerage company at San Pedro; and the allegations go on that by virtue of their brokerage position in the market they are able to control and attempt to control the flow of—restrain the flow of interstate commerce in fishery products. And none of the witnesses who testified are designated.

The question which puzzles me a little more in connection with the matter—I am satisfied that neither of these matters are material, in connection with the allegations of the indictment here or the mat-

ters now on trial, and I feel that something should be done to correct the record in that respect, in so far as the cross examination of the witness Ross is concerned about the dissolution of this association. But on second thought, he testified and the record shows that he was a party to the consent decree, and there isn't anything here to show that he was a party to the other decree, nor the witness Vitalich.

Mr. Dixon: You mean he was part of the F.T.C. matter, the cease and desist order?

The Court: Yes, the cease and desist order.

My inclination is to let it all in, but my judgment is that it is not material. I will sustain the objection.

Mr. Margolis: If your Honor please, we are going to ask leave at this time—we have one very short witness to be recalled for a few minutes and then one last witness, and at the end of that we are going to ask for a continuance until tomorrow for the purpose of subpoenaing Mr. Ross and Mr. Vitalich to establish, according to what is our information, what we are informed, that the organization is the identical organization in the two cases. In other words, if your Honor's ruling is based upon the question—I am not quite sure whether it is, because——

The Court: I think the whole thing is immaterial, counsel. I think it is immaterial. Ross testified that he told Zafran that he wouldn't sign it because he was restrained by this cease and desist order, the general idea being that Ross conveyed

the impression that he couldn't sign it because it was against the law as far as he was concerned. I don't think that makes any difference.

Mr. Margolis: I don't want to re-argue the matter; I am just concerned with the record at this point. If we can have a stipulation that I can make an offer of proof in the absence of Mr. Ross, I am satisfied with making my offer of proof. Otherwise we did think that there wouldn't be any question about the identity of the two organizations, because our information is—although we don't have a witness who can testify to it—our information is that that is common knowledge that the two organizations are the same—there weren't two organizations, there was only one organization, and that it continued. We don't want our record to be in such shape that we haven't established that point, therefore we want to either subpoena Mr. Ross and Mr. Vitalich for the purpose of establishing that, or we want to be in a position, if your Honor thinks it is immaterial, to make an offer of proof in their absence as though we had called them and asked them concerning this matter.

The Court: I think it is immaterial. Whatever reason Ross had for refusing to sign the agreement I don't think is material in this case.

Mr. Margolis: As I say, I don't want to argue that point, your Honor.

The Court: I understand.

Mr. Margolis: I do want to make my record. If we can have a stipulation that we can make an offer of proof as though Mr. Ross had been recalled, why——

Mr. Rubin: I see no objection to that.

Mr. Dixon: We can't stipulate that this is the same organization.

Mr. Margolis: I am not asking for that stipulation.

Mr. Dixon: I am sorry.

Mr. Rubin: The stipulation is, as I understand it, if Mr. Ross were called, certain questions would be propounded to which we would object and you are now about to make your offer of proof as to what those would show over our objections.

Mr. Margolis: Yes, based upon what my understanding of the facts are.

I offer to prove that if Mr. Ross were recalled, your Honor, and appropriate questions were put to him and he would be allowed to answer them, he would testify that the San Pedro Fish Exchange which is mentioned in Defendant's Exhibit HH and the San Pedro Fish Exchange which is mentioned in Defendants' Exhibit II are one and the same organization; that his company and the other companies which were members of the San Pedro Fish Exchange in 1940 at the time that the order, Exhibit II, was entered were also members thereof during the periods mentioned in Defendants' Exhibit HH; that his testimony to the effect that the San Pedro Fish Exchange was dissolved about 1939 or 1940 was not true——

The Court: That the San Pedro Fish Exchange mentioned in Exhibit II?

Mr. Margolis: That's right, which as I have said is one and the same organization in my offer of proof. That his testimony to the effect that the San Pedro Fish Exchange was dissolved about 1939 or 1940 was untrue, and that the fact is that the San Pedro Fish Exchange was not dissolved until after September 15, 1941.

And I further offer to prove that if Mr. Vitalich were called and asked the same questions he would testify to the same effect.

Mr. Dixon: If the court please, if counsel will state in open court that the facts that he has offered in proof, that he knows of his own knowledge that this organization is the same organization, then we will agree.

The Court: And the same membership.

Mr. Dixon: Yes, and the same membership.

Mr. Margolis: I do not know of my own knowledge. This is the information I have. I have no other way of offering to prove this. I am not going to make a representation that I know this of my own knowledge. It is my belief that if Mr. Ross and Mr. Vitalich were called and were confronted with these documents that they would so testify. I make that representation upon information. I did not know anything about those organizations in 1939, '40 and '41.

Mr. Rubin: The government objects to the offer of proof on the ground of immateriality, if your Honor please.

The Court: I think it is immaterial and the objection will be sustained.

What I am concerned about, however, is the matter of the record that has been made, as to whether or not I should formulate an instruction to the jury in connection with evidence of the same nature, in order that the matter may be—as long as we are using the word “flow,” in order that the matter may flow to the jury fairly.

Mr. Rubin: I think the record will disclose, if your Honor please, that during the course of the trial you have so advised the jury, and that you also indicated that at the conclusion of the case you would reinstruct them in that respect. I think that has been mentioned once or twice.

The Court: In any event, the objection to the introduction of the two documents is sustained.

Mr. Margolis: On the ground it is immaterial and irrelevant?

The Court: On the ground solely that it is immaterial, and no other grounds.

* * *

TRANSCRIPT OF TESTIMONY

(Resumed)

The Court: Call the jury down.

(The jury returned to the court room and the following proceedings were had in the presence of the jury:)

* * *

GILBERT ZAFRAN

recalled as a witness on behalf of the defendants, having been previously sworn, was examined and testified further as follows:

Direct Examination
(Resumed)

By Mr. Margolis:

Q. Mr. Zafran, I show you Defendants' Exhibit Y, which is the Constitution and By-Laws of Local 36, and direct your attention particularly to a printed series of pages, about six or seven pages, headed "By-Laws," and the first item under that "Membership"; will you explain what the printed matter is which is attached to this mimeographed sheet?

Mr. Dixon: If the Court please, I believe it speaks for itself. It is entitled "By-Laws of the Association."

The Court: Let me see what counsel has handed you.

(The document was passed to the court.)

The Court: Yes, I think it speaks for itself.

Mr. Margolis: If your Honor please, the government handed us that copy with that attached, and I just simply let it go in. We want to show that those actually are not a part of the by-laws of Local 36, and we want to explain what happened in that regard.

Mr. Rubin: Mr. Kibre testified as to what that was. I don't want to argue in front of the jury, but the testimony is in.

(Testimony of Gilbert Zafran.)

Mr. Margolis: Here is what happened, your Honor: We [3254] had a copy of the by-laws—constitution and by-laws of Local 36 which did not have that attachment, which Mr. Kibre——

The Court: You mean a mimeographed copy?

Mr. Margolis: Well, the mimeographed copy was identical with this mimeographed copy, except it did not have attached to it this printed material. After Mr. Kibre had identified the document, the mimeographed document, I offered it in evidence, and government counsel said, “That isn’t complete; here is a complete copy” and I took it and said, “All right, we will offer this one in evidence.” I subsequently discovered I was wrong, and this was not a correct copy, it was not the one that we have and the witness Kibre identified, so we now have in evidence some thing which is not a correct copy of the by-laws and I simply want to show it.

The Court: Why don’t you put Mr. Kibre on the stand?

Mr. Margolis: Because this witness is familiar with how this happened to get attached here, whereas Kibre was only familiar with the constitution as originally drawn. If I put Mr. Kibre on to ask him how this happened to get on he would say, “I don’t know.”

Mr. Rubin: He already testified as to how it got on. If I am in error I will stand corrected. In my opinion, if I recall correctly, he testified that Local 36 used the by-laws, printed by-laws which theretofore were used by Local 33, and they simply ripped them out of the constitution—— [3255]

(Testimony of Gilbert Zafran.)

Mr. Margolis: That is not the testimony.

The Court: Then let's find out what it is. Let me see the document.

(The document was handed to the court.)

The Court: Let me ask counsel the origin of this particular piece of paper.

Mr. Dixon: As I recall it, your Honor, that was produced pursuant to a subpoena duces tecum requiring the defendant association to produce a copy of their constitution and by-laws.

Mr. Margolis: That is correct, your Honor. I think that is true.

Mr. Dixon: And that is how the government came to have that document or exhibit in its possession.

The Court: This has pencil marks on it in here and arrows, and so forth. I suppose they ought to be erased before it goes to the jury.

The question is now what are these?

Mr. Margolis: That's right. As a matter of fact, your Honor will find that by looking at the mimeographed copy there is a section on membership, there is a section on membership on the printed copy that is different than the section on membership in the mimeographed copy. It is a document that obviously requires explanation.

Mr. Dixon: If the Court please, I believe we can refer [3256] to the record—I don't know just what the page number is at this time—which covers Mr. Kibre's testimony in which, as I recall his reply, he stated that the by-laws were taken from Local

(Testimony of Gilbert Zafran.)

33 and used by Local 36. And I think, as I recall it, I asked him about it at the time when the document was put in evidence.

Mr. Margolis: It is at page 2688. The witness said they did use the same by-laws that Local 33 uses. The by-laws are taken out of the published booklet of the Local 33 constitution. Then the witness never even looked at it, your Honor. It was handed to me and I offered it in evidence.

The Court: I don't know whether he looked at it or not. If he testified without looking at it, he is the witness.

Mr. Margolis: We are offering now, your Honor—

The Court: What page is that?

The Clerk: 2688.

(Transcript handed to court.)

Mr. Margolis: Your Honor, it all happened very quickly and I wasn't familiar with the document and I made a mistake.

Mr. Dixon: I think, your Honor, that I may be wrong, but it is my recollection that Mr. Margolis did read from the by-laws in reading from that document.

The Court: No, they were handed to him subsequently.

Very well. Upon your representation that you were unfamiliar with that document at the time it was handed to you, the objection is overruled.

Mr. Margolis: The record shows that that is so.

(Testimony of Gilbert Zafran.)

The Court: The witness may answer the question, and the question is, what do those by-laws represent.

Q. (By Mr. Margolis): By "those by-laws" I am referring to the printed documents.

A. You want to know what these by-laws represent?

Q. The printed by-laws attached to Exhibit Y and part of Exhibit Y at the present time.

A. Well, the printed by-laws that are attached to Exhibit Y, as I understand it, represent the admission of membership into Local 33. However, the constitution——

The Court: I think the explanation is getting involved.

Where did they come from?

The Witness: I don't know, your Honor. As far as we are concerned, the by-laws of Local 33 certainly shouldn't be [3258] attached to the situation as it is here.

Q. (By Mr. Margolis): Do you attach part of the by-laws and constitution of Local 33 to your by-laws as a matter of practice?

A. No. The only thing that we attach that had anything to do with Local 33 at all was the parliamentary procedure, which is generally the same. That is attached thereto. But there is an additional three or four pages that shouldn't be there. The part that we had attached is this parliamentary procedure part, which is usually the same deal. That was attached.

(Testimony of Gilbert Zafran.)

The Court: What do you mean by "this parliamentary procedure"?

Mr. Margolis: If your Honor please, the last three pages of this printed document are entitled "Selected Points on Parliamentary Procedure."

Q. Is that the part you customarily attached to your own by-laws?

A. That is the part we had attached to our by-laws. Where this other part came from, I don't know.

Q. And you do use the Selected Points on Parliamentary Procedure in Local 33, is that right?

A. Yes, that is right. That is the part that should be attached.

Q. Aside from that, do you use the by-laws of Local 33 [3259] at all?

A. No.

The Court: When a man becomes a member, do you give him a copy of that whole document there?

The Witness: We give him a copy of the constitution if he desires it.

The Court: You give it to him whether he asks for it or not?

The Witness: We don't. When he is sworn in we don't hand him a copy of the constitution, but he can have it at any time he desires it, or he can certainly find out what is in the constitution any time he asks. However, Local 33 did not have a booklet printed, the constitution printed in booklet form. We are a little short of money, and it takes a lot of money to have it printed, so we had it mimeographed and if a person asks for it we give it to him.

(Testimony of Gilbert Zafran.)

The Court: You do not hand it to him with the cards?

The Witness: No, sir. We don't hand it to him. As far as the obligation of membership into Local 36 is concerned, that is taken care of in the constitution itself.

The Court: That is, in the mimeographed portion?

The Witness: Yes.

The Court: Very well.

Mr. Margolis: We have no objection to these by-laws as to which the witness has identified as the by-laws of Local [3260] 33 remaining attached, but we are not offering them as the by-laws of Local 33.

The Court: They are all in evidence now, and the jury has heard the testimony, so when they come to a consideration of that particular portion they can give consideration to it that they believe it should have.

* * *

Cross-Examination

By Mr. Dixon:

Q. Mr. Zafran, you produced this document, did you not, marked Exhibit Y, pursuant to the subpoena served upon Local 36 to produce a copy of the constitution and by-laws?

A. I don't know that I did produce one. I don't believe I had one at the time.

Q. Do you know who produced this document?

* * *

The Witness: No.

(Testimony of Gilbert Zafran.)

Q. (By Mr. Dixon): Do you know whether it was produced pursuant to the subpoena served upon Local 36 to produce the charter and by-laws or comies thereof if the originals are not available of Local 36 or the International Fishermen & Allied Workers of America?

A. I don't know when they were produced, but I believe that there had been some question as to whether or not they should be produced, but when they were produced or who produced them, I don't know.

Q. So that you have no knowledge of how this——

A. No, I do not.

Q. ——portion of Exhibit Y——

The Court: He just answered that. You asked him that twice.

* * *

HARRY A. McKITTRICK

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Margolis:

Q. Mr. McKittrick, you are a defendant in this case?

A. Yes, sir.

Q. Are you a member of Local 36?

A. Yes, sir.

Q. How long have you been a member?

A. Since April 22, 1943. [3263]

(Testimony of Harry A. McKittrick.)

Q. Was that when the local was established?

A. About a month before that they actually started.

Q. Are you an officer of that Local or an employee of that local? A. I am an employee.

Q. Working in what capacity?

A. As business agent.

Q. Located where?

A. At present at Santa Monica.

Q. How long have you held that position?

A. Since February, 1945.

Q. Were you an employee of the local prior to that time? A. Yes, sir.

Q. In what capacity and where?

A. As business agent at Newport.

Q. For how long? A. April 22, 1943.

Q. Is that when you became an employee of the local?

A. I was hired by the executive board at that time.

Q. Prior to that time had you been a commercial fisherman? A. Yes, sir.

Q. When did you start fishing as a commercial fisherman. A. 1936.

Q. And did you fish continuously from 1936 to 1943? A. Yes, sir.

Q. During the period that you were a commercial fisherman have you ever owned a boat?

A. No, sir.

Q. During the period that you were a commercial fisherman did you ever own any interest in a boat? A. No, sir.

(Testimony of Harry A. McKittrick.)

Q. During the period that you were a commercial fisherman did you at all times work on boats on a share basis?

A. (Pause): Yes, sir.

Q. Is there any question about that in your mind?

Mr. Rubin: The question has been asked and answered, if your Honor please.

The Court: The witness hesitated.

* * *

The Witness: I hesitated a minute ago due to the fact that I was in charge of a live bait receiving barge for two years that was operated by Fellows & Stewart. I wasn't actually fishing during that period, and I hesitated to recollect how I was paid, but I was paid a share the same as a boat or a fisherman on a boat. [3265]

Q. (By Mr. Margolis): Was that a bait barge?

A. A live bait barge.

Q. You were in charge of that barge?

A. Yes, sir.

Q. You weren't actually going fishing at that time but there were others who were fishing on that barge?

A. Yes, sir.

Q. Do you know approxiamtely what percentage of the fishermen in the union in Newport Beach owned their own boats?

Mr. Rubin: That may be answered yes or no, may it please the Court.

The Witness: Yes.

(Testimony of Harry A. McKittrick.)

Q. (By Mr. Margolis): What percentage?

* * *

The Witness: I actually made a record at Newport in 1945 of all the boats fishing there and to the best of my recollection I believe there was 65 per cent of the fishermen [3266] that were workers or crew men and 35 per cent were boat owners.

Q. (By Mr. Margolis): The boat owners were also workers and crew members? A. Yes, sir.

* * *

Mr. Dixon: Pardon me. May I inquire, is that the union, Mr. McKittrick?

* * *

Q. (By Mr. Margolis): The question Mr. Dixon asked you was whether that was a survey of union boats or of all boats. A. Of all boats.

The Court: It is immaterial. The jury is instructed to disregard it. The only defendants here are the union and the named defendants.

Q. (By Mr. Margolis): Do you know what the situation was with regard to the union?

* * *

The Witness: No. [3267]

Q. (By Mr. Margolis): What percentage of the fishermen in Newport Beach belong to the union and what percentage did not at that time?

A. 95 per cent belonged to the union, 5 per cent didn't belong of the commercial fishermen.

Mr. Margolis: I submit, your Honor, in view of that statement that the figures are not far off under your Honor's instruction.

(Testimony of Harry A. McKittrick.)

The Court: Do you move to re-admit it?

Mr. Margolis: I move to re-admit it.

The Court: Motion granted.

* * *

Q. Are you familiar with the efforts since 1936 of fresh market fishermen to procure contracts with the dealers?

* * *

A. Yes.

* * *

Your first knowledge of the industry in connection with it was in 1936, is that right?

A. That's right.

Q. Starting in with that time, when is the first instance that you know of when fishermen made an attempt to procure contracts covering fresh market fish in the Southern California area?

Mr. Rubin: Just a moment. That is objected to, if your Honor please, as being immaterial and remote.

The Court: Let me hear it again.

(The question was read by the reporter.)

The Court: You mean the price of fresh market fish?

Mr. Margolis: Contracts generally. I will get to what kind of contract. This is a preliminary foundation question.

The Court: As a preliminary question it is admissible. The objection is overruled.

The Witness: May I answer?

(Testimony of Harry A. McKittrick.)

The Court: Yes, you may answer. And that is the date [3269] A. 1937.

Q. (By Mr. Margolis): Where was the contract presented? Which one of the ports, I mean by that.

Mr. Rubin: We object on the ground it is completely remote to the issues of this case, and immaterial.

The Court: I can't see the materiality of it, counsel. The objection is sustained.

Mr. Margolis: I don't want to——

The Court: Objection sustained, counsel.

Mr. Margolis: Your Honor, I was going to talk about something else. I intended to carry this matter——

The Court: Do you mean talk about a recess?

Mr. Margolis: That is all right, your Honor.

The Court: Go ahead.

Mr. Margolis: I intend to carry it on right up to date. I didn't know from your Honor's ruling if it was on the basis of remoteness.

The Court: I think it is remote.

Mr. Margolis: The reason I started there was that the previous evidence had been admitted going back to 1934, and I assumed if that wasn't too remote that the 1936 testimony wasn't either. However——

The Court: The objection is sustained. It is remote. Let's get on.

Q. (By Mr. Margolis): When was the next time that you [3270] know—I am trying to get

(Testimony of Harry A. McKittrick.)

some guidance, but if I have to ask him this way, I will. When is the next time that you know of when a contract—withdraw that.

When was the next time that the fresh market fishermen made an attempt to secure contracts in the Southern California area, to your knowledge?

A. You said fresh market?

Q. Yes.

A. May I ask if the previous question that I answered was also that pertaining to fresh market?

Q. Yes.

A. Well, I was wrong. I thought you said “contract.”

Q. I did say “contract,” but with regard to fresh market fish.

A. It wasn't with the fresh market. It was at Newport with the canneries.

Q. Now, will you answer, then, my question with regard to fresh market fish? When is the first time that you ever attempted to obtain a contract?

A. 1943 or 1944 with fresh market dealers.

Q. And where was that attempt made?

A. Santa Monica and San Pedro.

Q. Do you know of a previous attempt being made in Newport Beach?

* * *

A. No.

* * *

Q. (By Mr. Margolis): Those are the contracts concerning which there has been testimony, Mr. McKittrick, concerning which Mr. Kibre and Mr. Zafran testified, is that right? A. Yes, sir.

(Testimony of Harry A. McKittrick.)

Q. As an official of the union would you tell us something about your duties and your functions? What, generally, have been your duties and functions as an officer of the union?

A. I am afraid it will be objected to.

Q. Well, that shouldn't bother you.

A. Well, here goes. If I make a speech, stop me.

Mr. Rubin: Before you start, may we confine this—I am not objecting at this time, but may we confine this to what he did, not what his duties were supposed to be? We might not have too many objections if he testified as to what he did.

Q. (By Mr. Margolis): I will confine it for the present as to what you did as an employee of the union, what you had done.

A. I had hardly taken office after being hired before I was called on to take up subjects with the OPA, with the [3272] Army and Navy, Coast Guard, Western Sea Defense Conference, in reference to restrictions that were placed on the fishing industry by these various organizations and rulings of the OPA, and troubles with the dealers in violating the understanding that we had on prices that they would pay us. With the OPA we held several conferences in Los Angeles on barracuda and albacore, which we felt we had been treated unjustly on.

* * *

A. (Continuing) The dealers participated and all other government agencies, because we were in a war at that time, and our organization had been mainly formulated to——

(Testimony of Harry A. McKittrick.)

Mr. Rubin: Just a moment, if your Honor please. we were going to confine this to what Mr. McKittrick did.

* * *

The Court: By the way, you say you were hired as business agent?

The Witness: Yes.

The Court: Who hired you?

The Witness: Executive Board of Local 36 at Newport Beach.

The Court: Who is that? Executive Board is just a [3273] name. Were there people there?

The Witness: They were elected, fishermen.

The Court: Who were they?

The Witness: By name?

The Court: Yes.

Mr. Margolis: How many were there, first of all?

The Witness: Fifteen.

The Court: Well, do you know any of them?

The Witness: All of them. Johnny Norek, Malcolm Stewart, Charlie Wallace, Earl Bowers, Mel Butts, Keith Rima, Jess Furrow. Do you wish any more?

The Court: I don't know. I am just asking you who they were.

The Witness: They were actual fishermen who had been elected by the membership to act as executive board and management committee for the union.

(Testimony of Harry A. McKittrick.)

The Court: I see. Who was your immediate superior? Who did you take orders from?

The Witness: The executive board, those members.

The Court: You had to convene them every time?

The Witness: They meet once a week or on call. They had a regular procedure which is stated in the by-laws and constitution as to when they meet.

The Court: Did you have any dealings with Mr. Zafran?

The Witness: Mr. Zafran was working for the California [3274] Curing & Packing Company at that time. He wasn't with us.

The Court: In the union organization, when you want to get some orders who do you go to? Do you go to the secretary or somebody like that, or do you have to call the whole board together when you want to know what to do?

The Witness: I am actually the only officer, outside of this girl, in the office, but I can take no actual positive action, steps to do anything on my own initiative without the authority of that executive board.

The Court: That is for Local 36?

The Witness: Yes.

The Court: You are the business agent?

The Witness: At that time, 1943 to 1945.

The Court: I see. Now we get back to the business of what you were doing.

(Testimony of Harry A. McKittrick.)

Q. (By Mr. Margolis): You are still a business agent, aren't you? A. Yes.

Q. But your activities are limited to one port, is that [3275] right? A. Two ports.

Q. What are those two?

A. Originally Newport, I had authorization to assist the fishermen at Santa Monica and put in a sub-unit there, which I did in 1944; then in '45 I transferred from Newport to Santa Monica and got authorization to endeavor to organize the fishermen at Redondo and Santa Barbara.

Q. Do you still take orders from the executive board? A. Yes.

Q. Go on with what you do.

A. I found at Newport that the dealers complained that they couldn't buy any fish due to the fact that they didn't have any boxes to put those fish in and they had no place to store them, there wasn't a dealer in Newport that had even an ice box, so we had to do something about it, and I come into Los Angeles to the priority boards and met Mr. Squires, the chief of that department, Mr. George Roberts, the labor relations representative, and they put me in contact with the lumber association at San Francisco in an endeavor to get shucks so that we could built boxes. The priority boards granted us a priority to get that. Shortly later we got sufficient material to get the boxes, and they subsequently were built. That permitted us to deliver more fish, but at one time we had our boats come in loaded with fish, and the [3276] dealers couldn't buy them

(Testimony of Harry A. McKittrick.)

or wouldn't, and the fish lay on the boats and had to be re-iced, or they would have spoiled. And that period lasted for about a week's time. During that time the boats were unable to go fishing because they had a load waiting to be able to sell it, and the excuse was that the market was glutted and they couldn't get boxes and they couldn't get storage space. So I wrote a letter to the Pacific Ice Association at Frisco and got a list of the ice companies in the vicinity of Newport and Los Angeles who were in a position to take cold storage—had cold storage and would be able to take fish. On inquiry I found it was impossible to get any space allocated as the various dealers at San Pedro and in Los Angeles had most of the space contracted for on a yearly basis. One of the witnesses here, the Union Ice Company——

Q. Don't tell us about the witnesses. Go ahead.

A. I approached the Union Ice Company in Wilmington. They told me——

The Court: When was this?

The Witness: In 1944 and '45. And they told me they had 300 or a ton of space or over but it was all under contract to Los Angeles and San Pedro dealers and they couldn't take on any more independent or outside parties for the storage of any fish, so we had to do something about that, and I contacted one of the most responsible dealers in L. A., and through his [3277] help and our secretary Mr. Kibre we arranged with the ice company at Newport that they would build their own storage

(Testimony of Harry A. McKittrick.)

and put in a sharp freeze plant. Mr. Reed, the owner, finally did so, but it took over a year's time to accomplish that, and we virtually lost that extra fish which we could have delivered had we been able to accomplish that speedily enough.

Q. (By Mr. Margolis): During this period were any arrangements made for the delivery directly to Los Angeles of fish which the Newport dealers would not buy? A. Yes.

Q. Tell us what you did in that regard?

A. The boys came in one day and were told that they couldn't deliver any fish the next day, so they came over to the office and told me about it, and I investigated and found that the dealers said that the market was flooded, that they couldn't handle any more, so they were going to have to lay the boys off for a few days. I contacted the Paladini Company in L. A., and Mr. Puccinelli, their manager, gave me orders to go ahead and buy all the fish that I could and he would send his trucks down and take it all to Los Angeles, which I did. And that continued for approximately five or six days, when the dealers in Newport decided that they then could take fish again and told our boys to go ahead. At another time they had posted notices that they would take no fish. We called an indignation meeting of the fishermen, [3278] held it out in the open air, and had about three hundred fishermen present. They appointed a committee, of who I was one, and I suggested we go and see the canneries. We went to the Golden State Cannery in

(Testimony of Harry A. McKittrick.)

Long Beach and he agreed to take all the barracuda that we could catch, providing we would deliver it at the cannery in Newport, which was associated with him. He made us a price of 7 cents a pound, when we were asking for 10 from the wholesale fresh dealers, but he told us, "Remember, you can deliver to us seven days a week, whereas you can only deliver four days to the fresh dealers. They don't want much fresh fish on Friday, they don't take any fish on Saturdays or Sundays, and if you got 7 cents for round fish, that is actually a better price than 10 cents for cleaned fish," which was what the Newport dealers had been paying. Saturday they told us, the boys there, they could go fishing. Some of them asked. "How much are you going to pay?"

"Oh, a nickel or six cents."

"Well, I will be in tomorrow."

The Court: When was this?

The Witness: That was in 1944.

The Court: Still 1944?

The Witness: Yes, sir.

The Court: All right.

The Witness: When they came in they all passed up the fresh fish dealers and went to the end of the slip where the cannery was located, and we unloaded approximately 35 tons of fish.

That was transported to Long Beach and subsequently processed and put in cans.

(Testimony of Harry A. McKittrick.)

When the boys came by the dealers' places of business they were told, or asked, "What did you do with your fish?"

Mr. Rubin: Now just a moment. If your Honor please, we are going to object to any further testimony. I think we have gone far enough.

The Court: Yes. I think it is a little discursive.

* * *

Cross-Examination

By Mr. Dixon:

Q. Mr. McKittrick, I believe you testified on direct examination to some conversation with an ice company at Newport to build an ice plant for the storage of fish at Newport? A. I did.

Q. With what company were those conversations had? A. Newport Ice Company.

Q. Did they ever build a plant there at Newport?

A. They did.

Q. Now it is a fact, it is not, that Local 36 does not own, lease or operate any ice plant or storage plant for fish? A. That is correct.

* * *

Mr. Margolis: If your Honor please, at this time, subject to the one request that we have just made, the defendants [3282] rest.

The Court: Rebuttal?

Mr. Rubin: Mr. Whitmarsh.

ROBERT L. WHITMARSH

called as a witness by and in behalf of the government in rebuttal, having been first duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Rubin:

Q. Mr. Whitmarsh, what is your business or occupation?

A. I am a Special Agent of the Federal Bureau of Investigation.

Q. And you are a trained accountant, are you?

A. That is right.

Q. With reference to Government's Exhibits Nos. 42, 43, 44, 45, 46—— [3283]

Q. With reference to Government's Exhibit's 42, 43, 43A, 45, 46 and 42-B, 43-A, 43-B, 44-A, 44-B, and 45-A, have you made an examination of those exhibits for the purpose of abstracting certain information contained thereon?

A. I have.

The Court: Just a moment. Let's identify them more than by the number. Has the Clerk them?

Mr. Rubin: They are these large boxes and ledgers, if your Honor please. I think they would be more readily available by describing them from the Clerk's minutes. They are the boxes and the ledgers.

The Court: Will you move them around, Mr. Bailiff, and pile them on the Clerk's desk so that we can see what you are talking about?

(Testimony of Robert L. Whitmarsh.)

Now 43, 43, 44, 45 and 46 are the boxes?

Mr. Rubin: That is correct, your Honor please.

The Court: Of cards?

Mr. Rubin: That is right.

The Court: And the others are the ledgers, the books which have been identified as membership cards and ledgers of Local 36, is that correct?

Mr. Rubin: That is correct. No. 46, I believe, however, is the ledger account of Redondo Beach. I think that is the only one that doesn't carry an alphabetical initial.

Q. Now what is the general nature of the exhibits [3284] that you have just referred to as being those from which you abstracted this information?

A. They are the application cards filled out by applicants applying for membership in this local.

Q. And those exhibits that bear an initial following them, what generally are those exhibits?

A. Those are the current membership books of the local.

Q. Now will you state to the Court and jury the nature of the first examination that you made of the information contained only in the application cards?

A. I made an examination of the application cards and I was interested in this first examination in the information contained in these cards concerning the employment of the individual who made out the card. That is, whether or not he stated on this application card whether he was self-employed,

(Testimony of Robert L. Whitmarsh.)

whether he owned his own boat, or whether he was employed by someone else, or whether or not he made any statement whatsoever in that regard.

Q. And calling your attention to Government's Exhibit No. 58 for identification, I will ask you to state what was the gross total of the application cards which you examined.

A. I examined 1561 cards.

Q. And is that the total of the cards which are now in evidence?

A. That is correct. [3285]

Q. Now did all of those cards have information from your examination appearing thereon as to whether or not they were initiated members of Local 36?

A. Not all of them.

Q. Did you thereafter examine the cards for the purpose of selecting those which on their face appeared to be such initiated members?

A. I did.

* * *

The Court: Do you have several summaries there?

* * *

The Court: What are they?

The Clerk: 58, 59, 60 and 61.

(Documents referred to were marked Government's Exhibits Nos 58, 59, 60 and 61 respectively for identification.) [3286]

Q. Calling your attention to Government's Exhibit 59, what is that a summary of?

(Testimony of Robert L. Whitmarsh.)

A. Going through these cards I found that of the 1561, only 1121 applicants made definite statements as to whether they were self-employed, owned their own boat or were employed by another person.

Q. Now that is as to the total number of cards, whether they appeared to be initiated or not?

A. That is correct.

Q. Now calling your attention to Government's Exhibit No. 60, will you state generally what information is contained in that summary?

A. After analyzing and going through the total number of cards, 1561, I then tried to determine how many of these cards on the face of the card indicated that the individual had been initiated into the local.

Q. Now with respect—just one moment—with respect to that determination, what factors did you take into consideration?

A. With respect to that determination I noted those cards contained information on the face of them that the person was initiated. If it said initiated and the date and the initiation amount was indicated on the card, I then assumed that that person had been initiated into the local. [3287]

If no such information appeared on the face of the card I then checked the local membership list of the local to determine whether or not that member was a member of the local.

From this I found out that 1306 of the original 1561 applicants were initiated into the local. [3288]

(Testimony of Robert L. Whitmarsh.)

Q. Now, with respect to those that you determined were actually initiated into the Local, would you state to the court and jury the nature of the information that you abstracted from those cards and summarized in Government's Exhibit 60?

A. From this 1306 cards I took information from those cards containing statements as to their employment of these particular applicants. I noted that 460 of this 1306 stated that they were self-employed.

Q. What percentage is that of the total 1306?

A. 35-2/10 per cent. I then noted that 80 of these 1306 applicants stated that they either owned their own boat or were a co-owner of the boat. And this 80 is 6-1/10 per cent of the 1306 figure. The total number of applicants stating that they either owned their own boat or were self-employed was 540 out of the 1306, or a percentage of 41-3/10 per cent. I then noted that the total number of individuals applying for membership out of this 1306, 439 stated that they were employed by others.

Q. Mr. Whitmarsh, in connection with that statement they were employed by others, what was the nature of the information that was contained on the application card?

A. On the back of the application card there appeared a question as to employment, "Employed by," and this number 439 indicated employment by some other person by putting in the other person's name. [3289]

(Testimony of Robert L. Whitmarsh.)

Q. Was another name inserted?

A. At that point, yes.

Q. All right.

A. This 439 who stated they were employed by others is a percentage of 33-6/10 per cent of the 1306. I noted also, of this 1306, 239 applicants stated that they were employed, but gave no indication as to whether they were employed by themselves or by someone else.

Q. What would be the nature of the information in the employment blank with respect to that item?

A. After the question "Employed" they would merely state "Yes," which would indicate they were employed, but they gave no indication as to whether they were employed by themselves or by some other person. This 239 who gave no indication as to employed by themselves or others is 18-3/10 per cent of the 1306. There was another group of applicants who gave no information at all concerning employment. 43 applicants fall into this group giving no information at all, which is a percentage of 3-3/10 per cent of the 1306. Another group of 29 stated they were not employed. This is 2-2/10 per cent of the 1306. 14 of these applicants made no statement as to whether they were employed by themselves or by some one else, but they gave a type of work which would indicate that they were employed by others.

Q. Such as what? [3290]

A. Such as a deck-hand or a cook or some type of employment there that would indicate employment by others not an owner of a boat or self-employed. This is 1-1/10 per cent of the 1306.

(Testimony of Robert L. Whitmarsh.)

I also noted that two of the applicants out of the 1306 stated that they were fishing on shares, which is 2/10 of one per cent of the total count of 1306.

Q. As I understand, Mr. Whitmarsh, Government's Exhibit No. 60 representing a total of application cards of 1306 include those who gave earlier no information of how they were employer, or what else?

A. This summary 60 is the complete information given by the 1306 as to their employment, whether they were self-employed, whether they owned their own boat, whether they were employed by others, or whether they merely stated they were employed and gave no indication as to whether it was by self or others, or gave no information at all concerning employment, whether they stated they were not employed or made no statement as to whether they were employed but gave a type of work which would indicate that they were employed by others, and also the two who stated they were fishing on shares.

Q. All right. Calling your attention to Government's Exhibit, for identification, No. 61, I will ask you how many cards were examined from which that summary was prepared. [3291]

A. This summary was prepared from the one——

Q. How many cards were examined?

A. 993.

Q. What did that total represent?

A. This represented, this 993 figure represents the number of the 1306 which I previously broke down——

(Testimony of Robert L. Whitmarsh.)

Q. Just a moment. That 1306 were those that indicated they were members?

A. That is correct. This 993 is the number of the 1306 making definite statements as to whether they were self-employed, owner or co-owner of a boat, or were employed by others, or made a statement as to their employment which would indicate that they were employed by others.

Q. So that the 1306 percentages and numbers include those that make no definite statement and the 993 are those which do actually make some statement on the membership cards?

A. That is correct.

Q. And it appears therefrom that they were duly initiated as members, is that correct?

A. That is correct.

Q. All right. What did that summary indicate?

A. Of the 993, 460 applicants stated that they were employed by self or self-employed. This is 46-3/10 per cent of the 993. 80 of these applicants stated that they either own their own boat or were the co-owner of a boat. This is [3292] 8-1/10 per cent, or a total of 540 applicants stating either that they own their own boat or were employed by themselves, were self-employed.

Q. What percentage is that?

A. This is 54-4/10 per cent of the 993 figure.

The Court: 993 is the total of all of the 1306 cards from which any information was available concerning their employment, as I understand your statement?

(Testimony of Robert L. Whitmarsh.)

The Witness: Yes, the cards on which the applicant made a definite statement——

The Court: On which there was any information from which you could deduct that they were employed or not employed, stated that they were employed or not employed?

The Witness: Yes.

The Court: The rest of them had nothing on it?

The Witness: Yes, some of them had no information at all.

The Court: All right.

Q. (By Mr. Rubin): What is the other information contained on 61?

A. I found that 439 out of the 993 stated on the application cards that they were employed by others.

Q. In that connection what information was contained on the cards to the effect that they were employed by others?

A. "Employed by" is one of the questions on the application [3293] card, and they would write the name of a person following this question. This 439 who stated they were employed by others is 44-2/10 per cent of the 993. 14 of the 993 applicants I found made no statement as to whether they were employed by themselves, but the type of work which they gave on this application card would indicate employment by some other person. This 14 is 1-4/10 per cent of the 993. The total of those making a definite statement they were employed by others and making no statement but giving a type of work which would indicate they were employed by others is 453 or 45-6/10 per cent of the 993 figure.

(Testimony of Robert L. Whitmarsh.)

Q. So those that you could determine were actually members and did make some definite statement, 54-4/10 per cent were self-employed or owners or co-owners, and 45 per cent indicated they were employed by, and then the name of a party?

A. 45-6/10 per cent stated they were either employed by others or gave the nature of their employment to indicate they were employed by someone else.

Q. By filling in the name of a person in the blank?

A. That is correct.

Mr. Rubin: At this time the government offers Exhibits numbered 58, 59, 60 and 61, heretofore marked for identification, into evidence.

The Court: Admitted. [3294]

(The documents referred to, heretofore marked for identification as Government's Exhibits 58, 59, 60 and 61, were received in evidence.)

* * *

Cross Examination

By Mr. Margolis:

Q. As of what date are these exhibits made out?

A. They show the situation of all the cards in those boxes.

Q. And to what date do those cards run?

A. Well, they are the current membership ledgers. I am given to understand these are the current membership ledgers, and all applications which have been made to the union.

(Testimony of Robert L. Whitmarsh.)

Q. If a man, say, joined the union in 1943 and it showed that at that time he was initiated, he was included in this exhibit whether or not he was a member of the union at the present time, is that right? A. That is correct.

Q. So this is really not a statement of all of the members of the union as of any given time, but of all persons who have been initiated into the union since 1943 or the date [3295] that those cards begin, is that right?

A. The ones that applied for member represented by those application cards.

Q. Do you know what is the earliest date they run back to? A. No, I don't.

Q. They run back at least to the early part of 1943; that is so, isn't it?

A. I am not sure what date they run back to. I didn't check the dates.

Q. For example, here is one of the cards which is included, a card for Paul J. Alexander, 4-21-43.

A. That is correct, then.

Q. He was included in that exhibit, is that right?

A. He was.

Q. Do you know whether he is a member of the union now? A. No, I don't.

Q. Do you know how long he continued to be a member of the union? A. No, I don't.

Q. The total number employed by self, those men who indicated they were employed by self did not indicate whether or not they owned the boat, if they indicated that they owned the boat then you put

(Testimony of Robert L. Whitmarsh.)

them under owner or co-owner of boat, isn't that correct? A. That is correct. [3296]

Q. So that as far as these exhibits show, it is a fact, is it not, that only 6.7 per cent of the total number of application cards, including those who were and who were not initiated, owned boats and only 6.1 per cent of those initiated own boats?

* * *

The Witness: I see the 6.7 figure.

Q. (By Mr. Margolis): Don't you see the 6.1 figure on Exhibit 60?

A. Oh, yes. I see it.

Q. That is correct, is it?

A. The 6.7 per cent of the total applicants stated that they owned their boats. 6.1 per cent of the 1306 applicants who were initiated into the union, into the organization, stated that they owned their own boat. That is correct.

Q. As to those who were employed by self, you don't know whether they had an interest in a boat or whether they [3297] operated a boat owned by a cannery or by a dealer, do you?

A. No, they merely stated, where it said employed, they would write "self." That is where I got this information.

Mr. Margolis: That is all.

Mr. Rubin: Just one other question.

Redirect Examination

By Mr. Rubin:

Q. Mr. Whitmarsh, in connection with the information as to the percentage, as to those who

(Testimony of Robert L. Whitmarsh.)

stated they were the owner or co-owner of the boat, did the cards request that information specifically?

A. No, it didn't.

Q. And the information as to whether they were owner or co-owner was written in at what blank?

A. It was written in usually, employed by, they would say, "owner of boat" or "co-owner of boat."

Q. So that some of the answers in the blank "employed by" said "self" and some said "owner" or "co-owner" of boat? A. That is correct.

Q. There was no specific questions as to whether they owned the boat or not? A. No.

Q. Could you tell from the cards as to those who indicated they were employed by self that they were owners or co-owners of boats? [3298]

A. There was no way I could tell; no.

* * *

The Court: Does everybody rest?

Mr. Margolis: We do have that one request, your Honor.

Mr. Rubin: We will say it then. The government has no further rebuttal.

Mr. Margolis: As I say, the letters, we will not offer anything that will require a foundation.

The Court: The presence of the jury?

Mr. Margolis: That will not require the presence of the jury; no. [3299]

* * *

(The jury retired from the courtroom at 4:15 o'clock p.m.)

The Court: The letters which you suggested can probably be as appropriately presented Thursday morning as tomorrow morning.

Mr. Margolis: I see no reason for tomorrow.

The Court: Then counsel need not make the effort to come up tomorrow except to send a messenger up with the instructions.

Mr. Margolis: What time Thursday?

The Court: What time is convenient? 9:30?

Mr. Margolis: Any time your Honor sets.

The Court: Probably 10:00 o'clock might be better. [3301] 10:00 o'clock Thursday morning for conference as to the instructions.

Now I am not sure what is meant by the new rules requiring the defendants to be present at all stages of the proceedings and whether or not a conference on the instructions is a stage of the proceedings. Heretofore in criminal matters I have insisted upon them being present. In this matter we have recognized the waiver of their presence.

Mr. Margolis: It would seem to me that it would serve no useful purpose having them here.

Mr. Kenny: Mr. Kibre has offered to be here as a token defendant.

Mr. Kibre: We would like to keep the boys out fishing if possible.

Mr. Margolis: We do have one more thing, your Honor, for the purpose of the record. We do not propose to argue this matter, but for the purpose of the record at this time we desire to make a motion to dismiss on behalf of all and each of the defendants on the ground of the insufficiency of the evidence.

The Court: I have been wondering about some of the defendants here. I suppose logically if there was enough to hold them at the conclusion of the government's case there is now.

Mr. Rubin: That is correct, if your Honor please. [3302]

The Court: Because the individual defendants, as they have taken the stand, none have been examined upon anything except Mr. Kibre and Mr. Zafran, as to the facts concerning the making of the contract, its submission and the accusations in the indictment. That is to say, all the other defendants have been examined on the basis of who they were and what they did.

Mr. Rubin: That is correct. The record is the same now as to the individual defendants as it was at the time of the conclusion of the government's case, if your Honor please, with respect to the evidence against the individual defendants.

The Court: What is the evidence as to the defendant Lackyard? All the rest of them here have been actively engaged. He says that he is a member of Local 36 but that he never caught fresh fish except one month in 1945.

Mr. Rubin: If your Honor please, Mr. Lackyard has signed several of the contracts. He signed, for example, Government's Exhibits 332 and 334.

The Court: What are they?

Mr. Rubin: They are, I believe, the Newport contracts. I have a number of documentary exhibits that are indicative of admissions against interest.

The Court: Yes, I remember.

Mr. Rubin: And he was present at numerous meetings, and there was also oral testimony as to him. [3303]

The Court: I remember. I think that is probably sufficient to hold them.

On the question of the union, the by-laws have been introduced, their articles and constitution and by-laws, however you may wish to describe them, and the power of the union appears in them to create a strike committee or an executive committee, and the action and conduct of the executive committee has been testified to, so I suppose that there is enough to hold the defendant union as well as the others. [3304]

* * *

The Court: I am inclined to make a final disposition in so far as I can as I go along in these matters, and in the event there is a disagreement it looks to me like it would have to be a determination, as counsel says, on the part of the government whether they are going to prosecute or not prosecute.

I think I had better make a decision the way I see the matter now, and the way I see the matter now is no different than I saw it at the conclusion of the government's case which is, under the rules applicable at this time for the making of such a motion, that I must deny the motion for a judgment of acquittal as to all defendants. That will be the judgment of the Court on the motion. [3305]

* * *

CONFERENCE ON INSTRUCTIONS

Los Angeles, California, May 1, 1947, 10:00 a.m.

(The following proceedings were had in chambers outside the presence of the jury:)

Mr. Margolis: I have these letters that we mentioned, your Honor. I have shown them to counsel while we were waiting.

I have here, first of all, a copy of Exhibit 230—this is our copy but it is No. 230 in evidence—and we want to offer the omitted portions. As long as we are on the record I will identify these other letters that we want to offer. [2*]

* * *

Mr. Dixon: I think it is all right. We will object just for the purpose of the record.

The Court: On the ground it is immaterial?

Mr. Dixon: That is right.

The Court: Objection overruled. The remainder of Exhibit No. 230, which are minutes of a joint central council meeting of March 2, 1946, 1:00 p.m., are admitted in evidence so that the whole document is in evidence.

(The portions of the document referred to were received in evidence and marked Defendant's Exhibit MM.)

Mr. Margolis: As I understand it, with regard to these documents that I am offering, there is no question about foundation, is that correct?

Mr. Dixon: That is correct.

Mr. Margolis: The next one is a document dated

*Page numbers appearing at top of page of Reporter's Certified Transcript of Conference on Instructions.

November 3, 1945, headed "Action by Fishermen's Union 36," signed G. Zafran, Secretary-Treasurer.

* * *

Perhaps I ought to have these marked first.

(The documents referred to were marked Defendants' Exhibits Nos. NN to SS inclusive for identification.)

Mr. Margolis: Your Honor, I have had a series of documents marked NN, OO, PP, QQ, RR and SS for identification; NN being the one previously referred to dated November 3, 1945. Suppose I hand them to counsel and as they read them they can hand them to your Honor. Would that be satisfactory?

The Court: Yes, I think so.

Mr. Rubin: With respect to Defendants' Exhibit NN, in addition to the general objection, we might further state, and in response to counsel's statement that it is offered for the purpose of showing the nature of the activities, we submit that whatever activities are indicated here could in no fashion tend to prove or disprove any of the issues in this case, even as to the nature of marketing, which I assume it is admitted for, although it may be offered for some other purpose. [5]

* * *

The Court: Very well. They will all be admitted.

(The documents referred to were received in evidence and marked Defendant's Exhibits Nos. MM to SS inclusive respectively.)

* * *

The Court: The defendants' original instructions were numbered. I took the first set of supplemental instructions and have numbered all other instructions as 1 and chronologically down through your second set. Will you take your second supplemental instructions?

Mr. Dixon: Those were the ones marked S-11.

Counsel numbering instructions to conform.)

The Court: Have we our mechanics straightened out now?

(Assent)

On the instructions to the jury, I will repeat to the jury the instructions which I gave them identically at the beginning of the trial first. [8]

Mr. Margolis: As I recall it, those were just the general instructions?

The Court: Those were just the general instructions about weighing evidence, and so forth.

I will then give the following instruction:

“The mere fact that a witness might have been connected with the United States Government in any capacity whatsoever does not mean that the testimony of such witness is entitled to any greater weight or credence by that fact alone. You will consider the testimony of any officer or employee of the United States Government the same as you would consider the testimony of such person if he were not so employed.”

Any objection to that?

Mr. Margolis: None.

The Court: One of the defendants did not take the stand, so I thought I should give an instruction in connection with that as follows:

“You are instructed that the mere failure of a defendant to testify in his own behalf raises no presumption against him and you cannot consider his failure to testify in arriving at a verdict.”

(Assent)

Then this is the general plan: I will take Government's [9] Instruction No. 10. I have already said that in my general instructions, but I will say it again, but I will lead from this directly into the indictment. Any objection to that?

Mr. Dixon: No.

Mr. Kenny: No.

The Court: Then the next instruction is one which I drafted here yesterday.

“The law under which the within proceedings are brought is commonly called the Sherman Anti-Trust Act. The pertinent provisions thereof are as follows (from Title 15, U. S. Code, Section 1):

“ ‘Every combination, conspiracy in restraint of trade of commerce among the several states or with foreign nations is hereby declared to be illegal; * * * Every person who shall engage in any combination or conspiracy’—I will

strike out "combination" there—"in any conspiracy declared to be illegal shall be guilty of a misdemeanor * * * ' and on conviction thereof, appropriate punishment is provided by the statute.

"You are not to be concerned with the punishment, or take it into consideration in your deliberations as that is a matter which is the exclusive responsibility of the judge in the event of a conviction. [10]

"You are not to be concerned with the reason for the law, or whether you regard it as a good or bad law. It was passed by that branch of the government charged with the responsibility of making laws. It is constitutional and it is the law of the land, and you must accept it as such.

"The indictment, which was outlined at length at the beginning of the trial by Government counsel, also in argument——"

He will have made the argument. I suppose you will do it again now?

Mr. Dixon: Yes.

The Court: "——charges in brief"——

And I am taking this from Paragraph 12 of the indictment.

"——that sometime prior to May 1946, the defendants engaged in a combination and conspiracy in Southern California to 'fix, establish and maintain arbitrary artificial and non-competitive prices for the sale to dealers of fresh fish and crustaceans caught in the waters

of the Pacific Ocean, both territorial and foreign, off the coast of California, from Morro Bay south to and including the territorial waters off the West Coast of Mexico, and to prevent dealers who did not agree to pay said prices from obtaining, selling or shipping any fresh fish or crustaceans, all in violation of the above-entitled Sherman Act.' The indictment goes into much more detail, but the foregoing is the essence of the charge to which you must respond with a verdict of either 'guilty or not guilty. You may have the indictment in the jury room if you wish so that you may see all of its terms.'"

Then I propose to follow that——

Mr. Rubin: May I interject for a moment? I think in the first portion you struck out the word "combination."

The Court: Yes.

Mr. Rubin: And in the quotation from the statute you also struck it out. The indictment does charge a combination and conspiracy.

The Court: I think I had better leave it in then.

Mr. Rubin: I think the quotation should have it in too.

The Court: Yes, because the indictment charges——

Mr. Dixon: I have the language right here.

The Court: I took the first clause: "Every contract, combination and form of a trust or otherwise or conspiracy in restraint of trade or commerce

among the several states or with foreign nations is hereby declared to be illegal." Now this hasn't anything to do with foreign nations, or does it?

Mr. Dixon: No. [12]

The Court: You are not alleging that it was a contract, so they shouldn't be confused with that. You are not alleging that it was in the form of a trust.

Mr. Dixon: That is right.

The Court: Or otherwise. You allege every combination or conspiracy in restraint of trade or commerce among the several states is hereby declared to be illegal.

Mr. Rubin: I think perhaps the language of "foreign nations" should be in because of the commerce element with respect to Mexican shipments, and the fact that fish does come from international waters.

Mr. Dixon: On second thought I think the indictment does charge it.

The Court: No, you allege the nature of the trade and commerce involved in paragraph 10, the fishing area, and I quoted that. I describe it and I take it from your quotation, "fishing area" refers to the waters of the Pacific Ocean both territorial and foreign.

However, I think probably that that had better be in.

I then propose to give Government's Instruction No. 7, followed immediately by Government's Instructions 16 and 17 and 8. They all relate to a general description of a conspiracy, what it is and why. [13]

Mr. Dixon: On going over Instruction No. 7, we suggest that possibly the language on lines 26 and 27 might be stricken.

The Court: On page 2?

Mr. Dixon: Yes. This is the part we suggest be eliminated, "if you find there was a dissolution or abandonment thereof," because I do not think that is an issue in the case.

The Court: I will state my notion on that. I noticed that in there, and if that were not in there I had intended again to give the instruction to the jury which I gave during the course of the evidence.

Mr. Dixon: That is the reason I suggest the withdrawal of this because you have already covered it.

The Court: I have covered it but I think it ought to be stated now, and in that connection there was some testimony by Kibre from which the jury might conclude that he had withdrawn from the conspiracy.

Mr. Dixon: That instruction, as I recall, related to whatever evidence, I mean, his statements could not be used, the statement of anyone who has withdrawn from a conspiracy could not be used against anyone else charged with being in the conspiracy under the rules of evidence we have referred to heretofore.

The Court: The rule as I stated it was, if they concluded that Kibre has withdrawn from the conspiracy, thereafter [14] statements by other conspirators cannot be binding upon him.

Mr. Dixon: That is right. And the converse of that is true also.

The Court: Or the converse of it, statements by him cannot be binding.

Mr. Dixon: Or used against anybody else. I think that was the rule recently decided in 329 U. S.

Mr. Rubin: Then I believe we also amplify that in stating that the withdrawal of a conspirator is no defense unless the withdrawal occurs prior to the 3-year statute.

The Court: It occurred to me that this statement here was sufficient to cover the whole situation so that the jury could conclude or not conclude as they deemed the fact to be, and it is sufficient without my giving the instruction which I gave during the course of the trial.

Mr. Margolis: We have two objections, your Honor. We are talking about Government's Instruction 7 at this point?

The Court: That is right.

Mr. Margolis: With regard to the second page of that instruction, the sentence on lines 1 to 3, we think under the circumstances of this case is likely to be misleading because it does not allow for a situation in which the purposes and objectives of the agreement between the parties are changed as of the time of the joining of the new party and where he only binds himself to those changed purposes and objectives. We think that there should be language in there to the effect, however, that this does not apply where at the time the person joining the conspiracy joins it only to achieve purposes and objectives different from those.

The Court: No, I don't think that that would be appropriate because the Government has set out here to prove a conspiracy to fix prices in restraint of trade. If thereafter it becomes a conspiracy for some other purpose, which is a legitimate purpose, nobody is guilty.

Mr. Margolis: Our objection is on the ground that this is subject to a misinterpretation.

The second objection, your Honor, is with relation to lines 19 to 22 of the same page of Instruction No. 7. We object on the following grounds, that the indictment does not state a cause of action and that therefore proof of the facts set forth in the indictment are not sufficient for any purpose. And, second, that even if the facts alleged in the indictment are proved it doesn't allow for the establishment of defenses such as the defendants were operating under the Fishermen's Marketing Act and exempt under the Clayton Act, and subject to the interpretation that if the government proves the facts set forth in the indictment that then the defense of the Fishermen's Marketing Act, and the defense of the Clayton Act and the defense of the rule of reason will not apply. [16]

The Court: On your first ground of objection, I have already passed on that.

Mr. Margolis: Yes, your Honor, we understand that.

The Court: As to the second ground of objection, I think that that is taken care of by subsequent instructions.

Mr. Margolis: Then I understand your Honor by that has ruled on our objection?

The Court: That is right.

Mr. Kenny: In the language offered by the Government on line 26, "if you find there was a dissolution or abandonment thereof," that is to go out, is it?

The Court: No, I am leaving that in because in following the testimony, and the only defendant witness to which it might possibly be applicable—I won't say that but I do recall distinctly that in Mr. Kibre's testimony it would be possible—for the jury to conclude that he abandoned the original conspiracy.

Mr. Margolis: Just as a matter of procedure, I assume after we have made objections and your Honor has ruled that it will not be necessary for us to repeat our objections in order to preserve our record?

The Court: In that connection, I think that the objection should be made in the presence of the jury but not argued. [17]

Mr. Margolis: The rules seem to provide——

Mr. Kenny: For outside the presence of the jury:

The Court: I know that, but the rule before the adoption of the new rules used to be that they had to make them in the presence of the jury, and they reversed some cases because the defendant's lawyers didn't make them in the presence of the jury.

Now while the rules are promulgated by the Supreme Court and they are presumed to be valid and

constitutional and regular, the occasion might arise when the Supreme Court might say, "Well, yes, we adopted the rule but it isn't any good." So I have followed the practice in all criminal cases where the objections have been stated at length that in the presence of the jury the defendants merely state that they wish to object to the instructions before the jury as outlined previously. In that way you preserve your record so that if at any time you need it you will have your record.

Mr. Kenny: So long as we make our record now in general terms.

The Court: Yes. You make your record now and your reasons and grounds for the objections. If you do not wish to do it, it is all right with me.

Mr. Kenny: It might be an act of caution.

The Court: It is just an act of precaution that I have pursued in the effort to protect the record for any defendant in case a situation should happen like in the Ballard case where seven years after the indictment was returned they suddenly discover that the grand jury was not properly constituted.

Mr. Margolis: Then we won't have to repeat the objection.

The Court: No. You will just make your simple statement, as I have indicated. In other words, I do not want to put the defendants in the position of possible prejudice to the jury by arguing about the instructions.

Now the next one is Instruction No. 16. Do you have that?

Mr. Margolis: Isn't that covered by No. 7?

The Court: No, I do not think so. If in connection with No. 16 you will also read No. 17 and No. 8, they are all of the same general nature.

Mr. Margolis: We would like to object to No. 16 and 17 on the grounds that they are covered by No. 7—and by No. 16 and No. 17 I am referring to Government's Instruction 16 and 17.

We would like to object to the last sentence of Government's Instruction No. 8 on the grounds previously stated, that it incorrectly states the law, that the indictment does not state a cause of action, and on the further ground previously stated that it may be misleading.

The Court: I think the last sentence can go out. It is repetitious. [19]

Of course it is a repetition which clarifies and seems to me to work to the advantage of the defendants in view of the first sentence. I think the first sentence should go in.

Mr. Margolis: We are not objecting on the ground that it is repetitive. Our objection is actually the same objection which was made to the cause of action, also that it may be misleading as to affirmative defenses.

The Court: Very well. That is overruled.

* * *

Now those are all of the preliminary instructions. We now come to the disputative part of the instructions, and I think perhaps the best way to handle that is to say that in considering all of the defendants' instructions I took in mind and had before me Government's Instructions Nos. 1, 2, 4, 5, 6, 3 and

15. Now in order that this may be referred to in the record I will lump all these instructions together under one, the general instructions, and will call this latter Court's Instruction No. 2.

Now before we go into the disputative matters, if you will take Government's Instructions Nos.—these instructions that are offered by the government I am pulling out as covered—they are, No. 9, 11, 12, 13, 14, 10—just a moment now. I believe I have the numbers mixed up.

Mr. Margolis: Your Honor has stated that you are going to give ten.

The Court: Yes. We might renumber these together.

(Renumbering instructions to conform.) [21]

Mr. Margolis: These matters that are covered by your Honor's preliminary instructions, as I remember.

The Court: Yes, I think so.

Mr. Margolis: As I remember, your Honor instructed on reasonable doubt.

The Court: Yes, reasonable doubt, and then I have a concluding instruction here. I will read that to you so we will get all these general matters out of the way. It is a rather long one. This will be the concluding instruction. This is a general one:

“There is nothing peculiarly different in the way the jury is to consider the proof in a criminal case from that by which men give their attention to any question depending upon evi-

dence presented to them. You are expected to use your good sense, consider the evidence for the purposes only for which it has been admitted, and in the light of your knowledge of the natural tendencies and propensities of human beings, resolve the facts according to deliberate and cautious judgment; and while remembering that the defendant is entitled to any reasonable doubt that may remain in your minds, remember as well that if no such doubt remains the government is entitled to a verdict, for to the jury exclusively belongs the duty of determining the facts. [22]

“You are instructed that if the judge has said or done anything throughout the trial or in these instructions which has suggested to you that he is inclined to favor the claims or position of either party, you will not suffer yourselves to be influenced by any such suggestion. The judge has not expressed, nor intended to express, nor intimated or intended to intimate any opinion as to what witnesses are or are not worthy of credence, what facts are or are not established, except the facts which have been stipulated to by the parties throughout”—— Well, I haven't done that. “——or what inference should be drawn from the evidence adduced. If any expression of the judge has seemed to indicate an opinion relating to any of these matters I instruct you to disregard it.

“You should not consider as evidence any statement of counsel made during the trial or

argument unless such statement was made as an admission or a stipulation conceding the existence of a fact or facts. You should not consider for any purpose any evidence offered and rejected, or which has been stricken out by the court. Such evidence is to be treated as though you had never heard it. You are to decide this case solely upon the evidence that has been admitted by the court and the inferences that you may reasonably draw therefrom and such presumptions as the law may deduce therefrom, as given in these instructions.

“It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to your individual judgment. To each of you I would say that you must decide the case for yourself, but you do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. However, none of you should vote either way, nor be influenced in so voting for the single reason that a majority of the jurors are in favor of such a conclusion. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of the other jurors.

“Remember that you are not partisans or advocates in this matter, now you are judges. The final test of the quality of your service will

lie in the verdict which you return to this court room and not in the opinions which any of you may hold as you retire. Have in mind that you will make a definite contribution to efficient judicial administration if you arrive at a just and proper verdict in this case, and to that end the court will remind you that in your deliberations in the jury room there can be no triumph excepting the ascertainment and declaration of the truth.

“And after the bailiffs are sworn you will retire,” and so forth.

Mr. Kenny: Elect a foreman?

The Court: Yes.

Do you have the notes of those I have withdrawn as covered?

Mr. Dixon: Yes.

The Court: Is there any objection?

Mr. Dixon: No.

The Court: All right. Now, do you have any objection to the court's instruction No. 2?

Mr. Margolis: None.

The Court: Very well. I am taking up the defendants' instructions, and have the government's there beside you, because you will wish to refer to them.

Mr. Rubin: Which are you going to consider first, Judge?

The Court: I am going to consider the defendants'.

Mr. Rubin: Which of the three sets?

The Court: In their order, 1, 2, 3. I have them numbered chronologically, and then the S-1 supplement and so forth. We will start with No. 1.

Mr. Kenny: This is in the order in which they will be given that you are indicating?

The Court: All these that I have considered heretofore will be given first, to this point. From this point on——

Mr. Kenny: Are you indicating the order in which you are going to give them now?

The Court: Yes.

Mr. Kenny: O. K.

The Court: Well, I don't know. I have laid out here in the government's instructions, 1, 2, 4, 5, 6, 3 and 15, in that order. Now, taking the defendants' No. 1, I have covered conspiracy pretty well, but if the defendants want that instruction given I think it might well be given along with the other instructions on conspiracy.

Mr. Margolis: We would like to have it. There is a sort of evil connotation about the word generally understood.

The Court: All right. I will give that, then, immediately following government's No. 8. [26]

Defendants' No. 2 and No. 3 seem to me to be immaterial.

Mr. Margolis: Do I understand that your Honor's ruling is that they will be——

The Court: Declined on the ground that they are immaterial.

Mr. Margolis: Is it necessary for us to state that we object——

Mr. Kenny: The fact that we offered them——

Mr. Margolis: In order to make our record entirely clear, we state that we object to the refusal to give the instructions on the ground that we believe them to be material.

The Court: I have got them all lined up here, and maybe you can make your objection at the end.

Mr. Margolis: Very well, your Honor.

The Court: No. 2 and 3 I regard as immaterial.

Instruction No. 4, I am a little puzzled about. I don't know whether the offered instructions by the government cover that or not. I think No. 4 is not a correct statement, and defendants' supplemental 12—no. Wait a minute. There is another instruction that you offered that I thought might be modified or combined with defendants' No. 4. That is No. 15. The general idea I don't think is covered in either one of them, but it is suggested by them, and I don't think it is covered by the government, and the general idea is this: that the defendants are not charged here and it is not a violation of the law to interfere with the business of any individual dealer or dealers. What they are concerned with is an interference with the general commerce in fresh fish.

Mr. Rubin: We prefer the word "restraint," if your Honor please, in the language of the statute, because "interference" connotes a physical diminution.

The Court: "Restraint" then.

Mr. Rubin: Yes, I think the word "restraint" explains it.

The Court: I think No. 4 will be rejected and No. 15 rewritten as 15 to take its place.

* * *

The Court: Now, wait a minute. Let me see this now as I have it. The last sentence can go out. All right. Here is the suggested change or form:

“I instruct you that any alleged or proved restraint by one or more of the defendants with the business of any so-called individual fish dealer or dealers mentioned in this case is not the controlling factor to be considered by you in arriving at your verdict in this case. The government must prove a conspiracy to restrain in a substantial way the interstate or foreign commerce in fresh fish, and that is the basis of the charge presented to you.” [29]

That, then, will follow Defendants' No. 1 which follows government's No. 8.

Mr. Margolis: May I say a word about 4, your Honor, because it will get lost in the shuffle if we wait until the end?

The Court: Yes.

Mr. Margolis: I think that the instruction in the original form in which it was proposed by the defendants is incorrect, because——

* * *

Mr. Margolis: Because it, in effect, says that there must be a direct effect upon interstate commerce, whereas we are dealing with an agreement

and the effect is immaterial. We would, therefore, like at this time to ask leave to amend the proposal to read as follows: [30]

“I further instruct you that in this case the government must prove as one of its main contentions,”—I would strike “as one of its main contentions”—“must prove that the alleged agreement entered into between the defendants had”—and here I would insert the words “as its intended result,” so it would read, “that the alleged agreement entered into between the defendants had as its intended result a direct effect upon interstate commerce.” And then in the last sentence on line 11 we would strike the word “its” and substitute “such” and the word “is” and substitute “would be” so that the last sentence would read: “And further, even if you should find that the agreement may have an effect upon interstate commerce, if you find that such effect upon interstate commerce would be only indirect or incidental or remote to such commerce, then you should find all the defendants not guilty.”

We ask leave at this time to amend our instruction in that way.

The Court: I think that instruction might be given following the one that I just indicated.

Mr. Rubin: If your Honor please, we would object to the instruction as amended, as proposed to be amended, on the [31] ground that it would indicate to the jury that there must be an intent

to restrain commerce, and that, of course would imply a specific intent which is not and has not been an issue in this case.

The Court: That is this case the government must prove that the alleged conspiracy——

Mr. Margolis: I think there is something to what the government says.

The Court: “I further instruct you that in this case the government must prove”——strike out “as one of its main contentions”——“that the alleged.” instead of “agreement entered into between the defendants,” because that implies that I have decided that they did enter into an agreement, says that the alleged conspiracy had for its object——

Mr. Margolis: That would do it.

The Court: That the alleged conspiracy had for its object, or would have had?

Mr. Rubin: The object, if your Honor please, is determined from the facts, not from a specific finding of the jury. All that we have to show is what they did, and we don't have to show that they did that for any particular purpose. If for any purpose they did these things that constituted a restraint of trade.

The Court: That is what I say——no, not that it constituted a restraint of trade, but they formed a conspiracy to restrain [32] trade.

Mr. Rubin: That's right, without regard to the purpose, however.

The Court: That the alleged conspiracy would have had a direct effect upon interstate commerce in fresh fish.

Mr. Rubin: How would it read, then?

The Court: "I further instruct you that in this case the government must prove that the alleged conspiracy would have had a direct effect upon interstate commerce in fresh fish."

Mr. Rubin: The question of direct and indirect effect, if your Honor please, particularly under the cases cited here, are those in which there is no price fixing involved, and as we have discussed before where there is price-fixing, where that is the matrix of the charge, the question of the effect is a matter of law and not to be determined by the jury.

These are labor cases that are cited down here, and just as in the second Coal case the question of the direct or indirect—as a matter of fact, this instruction is an Apex v. Leader instruction where the question of direct and indirect effect is construed; not a price-fixing instruction. That is our objection to that.

The Court: Here is the thought that I have in mind in connection with the matter, and in my notes I merely put a [33] question mark about it: Suppose the defendants conspired to fix the price on something that was not moving or didn't move in interstate commerce, it wouldn't be a violation of the law.

Mr. Rubin: That is correct.

The Court: Therefore it either must move in commerce, must have a direct effect on commerce, or directly move in commerce or something. In other words, the jury has got to find, as a matter

of fact, that there was interstate commerce in fresh fish before they can find an agreement to fix prices restrained that interstate commerce.

Mr. Rubin: We would have no objection to that kind of instruction.

The Court: That is what I am trying to get here. Give me some ideas.

Mr. Kenny: I can cite *Lowe v. Lawler* as authority for that, your Honor.

The Court: That the alleged conspiracy——

Mr. Rubin: I think this might be adequate: That the subject of the conspiracy—that the trade and commerce which you may find to be the subject of conspiracy must be interstate commerce.

That is something else that has a direct effect on it.

The Court: Suppose, now——

Mr. Margolis: It is all right the way it is. [34]

The Court: Let's say this: Suppose that one fisherman and one fish dealer entered into a contract to fix prices, I don't think you could get a conviction.

Mr. Rubin: That is correct, if your Honor please, and that is the reason——

The Court: Because it wouldn't affect interstate commerce. It would be trivial, remote, incidental.

Mr. Rubin: And that is the reason that your Honor changed the language in the previous instruction to state to effect in a—commerce in a substantial way.

That was the purpose of that instruction. Now, that has to do with the amount of the commerce, the substantial amount of the commerce.

This instruction has to do with the nature of the effect of it.

When you talk about direct or indirect effects, then you are talking about something that is contemplated in the Apex case, and not a price-fixing case.

Mr. Margolis: Let's assume, your Honor, that there was a contract—the reason we want direct or indirect, let's assume there was a price-fixing agreement which affected only products in intrastate commerce, but indirectly that price-fixing agreement would result in affecting the prices of commodities moving in interstate commerce.

The Court: Then it would be within the law, it would [35] be within the inhibitions of the Sherman Act. That has been true ever since—what is the name of that railroad case that Chief Justice Hughes wrote the opinion?

Mr. Margolis: If that was part of the plan. But let's assume that the only effect was that the people competing would raise their prices because they say, "Well, we will raise our prices because you have raised yours."

The Court: Let me study this a minute here.

Mr. Dixon: I think it has already been covered, Judge.

Mr. Rubin: That covers the volume of commerce.

The Court: I think maybe that other instruction, S-15, would cover the idea I had in mind. I considered the two together, and I thought out of the two of them there ought to be some statement—

Mr. Dixon: 15 covers it, your Honor.

The Court: I think it does. All right. We go to defendants'—

Mr. Margolis: At this point, your Honor suggested we wait until the end, but because as we discuss them it would be rather difficult—

The Court: All right, if you have a special objection, make it.

Mr. Kenny: First, I would just suggest if 15 is only to be given, that the second sentence read: "The government must prove a conspiracy"—

Mr. Rubin: 15?

Mr. Kenny: S-15. "The government must prove a conspiracy to restrain in a direct and substantial way."

The Court: No, it doesn't have to be direct.

Mr. Margolis: With regard to defendants' instruction No. 4, we want to show that our objection to the refusal to give that instruction is an objection to give the instruction in the manner that it was last worded by your Honor, not as originally phrased by us.

Do I make myself clear on that point, your Honor? In other words, we object to the failure to give an instruction reading as follows:

"I further instruct you that in this case the government must prove that the alleged conspiracy would have had a direct effect upon interstate commerce in fresh fish * * *"

The Court: All right. Defendants' No. 5 is covered in that in my judgment, as I have stated, by this instruction over here the jury is not concerned with the reason for the law or whether they regard it as a good or bad law, or whether it is good or bad. All these matters, it appears to me, in No. 5 and a number of other instructions which I will indicate, would put me in the position of arguing the case to the jury. In other words, what I have got to do is to state the law without that, which I think I have done. So [37] No. 5——

Mr. Margolis: We would like to have your Honor consider as a separate instruction, as though it were two instructions, paragraphs 1 and 2 of Defendants'—they are not numbered 1 and 2, but the two paragraphs of defendants' proposed instruction No. 5.

The Court: The second paragraph there I think is not a correct statement of the law, completely correct, and is covered by the government's instruction No. 5, which I think sets up fully and fairly and accurately the law with relation to the defendants' contention that they are a labor union, and I deem it to cover a great many of the instructions offered by the defendants.

Mr. Kenny: I just submit this to the court, that this is a statement of Section 6 of the Clayton Act, which I think your Honor, if you read Section 1 of the Act, should also read to the jury.

* * *

Mr. Rubin: That is not Section 6 of the Clayton Act. It may be a paraphrase of it.

Mr. Kenny: It is a paraphrase of it. If the paraphrase is not to be given, then we would like to have at least the section itself read. [38]

Mr. Rubin: I don't even think that it is a paraphrase.

Mr. Kenny: Do you have any objection to the reading of Section 6 of the Clayton Act, and it becomes 17 of the Sherman Act as they piece it together in the book the judge has before him?

Mr. Rubin: I think you proposed that, and may I suggest we defer that until we come to the discussion of the instruction?

The Court: All right. I will set that aside here.

Mr. Rubin: No. 5, if your Honor please, we submit isn't even a paraphrase of the Clayton Act. We submit that is entirely inapplicable. It states what the Act does not provide.

Mr. Kenny: I think we can waive paragraph 2, all right, if we had our instruction No. 11. That is the first 11. It is not the one marked "S-11."

* * *

The Court: I am wondering if I couldn't read that at the beginning of Government's No. 5

Mr. Kenny: That is, read Section 6 of the Clayton Act?

The Court: Yes. [39]

Mr. Kenny: That is what we asked for.

Mr. Margolis: We would object to that because we think that is inconsistent with government's instruction No. 5, because government's instruction No. 5 we think treats the law as though in order to come within the exemption of the Clayton Act

you must be a labor union, whereas it is our contention that the Clayton Act itself makes any labor not a commodity and exempts labor regardless of whether the organization is in the form of a labor union or not; and, therefore, we say the two are inconsistent.

Mr. Dixon: Section 6 of the Clayton Act standing alone, your Honor, is entirely too broad to have any meaning, unless placed in the context of the issues of fact in the case before the court. It is only in that light that it can be given any meaning, and it is in that light that it has been construed by the Supreme Court.

* * *

Mr. Margolis: I would just like to say this: In the Hinton case a conclusion was reached based upon what amounted to practically stipulations. In the Hinton case there wasn't [40] any question of determining upon the basis of evidence as we have tried to have it determined here just what the exact status of these people were, but the effect of it was,

"Sure, we come in and we admit that we are independent business men," and so forth. The whole record shows that that issue was never tried out, and, therefore, to give an instruction based upon the Hinton case as though the issue had been tried out in the Hinton case, when it wasn't, prevents us from trying out the issue in this case.

Mr. Kenny: As though the issue in the Hinton case were identical with the issue here.

Mr. Rubin: The question is what the legitimate objectives of labor may be and whether or not they

are immune, and we have argued that time and again. Judge Kenny has argued that labor is per se exempt regardless of whether they are a labor union or not. That has been argued.

Mr. Kenny: I have never argued that labor per se is exempt.

The Court: I think No. 5, if Section 6 is read, would not be subject to the objection which you have offered, because the last sentence of Section 6, or Section 17—do you have it before you?

Mr. Margolis: Section 6 of the Clayton Act, which is Section 17 of the Sherman Act?

The Court: Yes, the last sentence reads: “nor shall [41] such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, * * *”——

Mr. Margolis: Our contention is that refers to organizations in which labor is what being dealt with, labor is actually the commodity. We think that at least upon the basis of the presentation here the jury has a right to determine, as a matter of fact, whether boats which are being used are the investment, or whether they are merely the tools that are being used, and substantially what is being sold here are the products of labor and not of any invested capital. That question of fact was never presented in the Hinton case, was never resolved, because the facts weren't presented.

The Court: If you wish I will read Section 6 of the Clayton Act just prior to government's instruction 5, and I think that 5 doesn't prejudice your conception here that not only under Section 6

are labor organizations exempt, but under Section 6 individuals are also exempt, because it says here, “* * * not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations * * *.” Every defendant here is a member of this organization, and you have to have some relationship in your instruction to the facts in the case.

Mr. Kenny: Section 6, then, of the Clayton Act would be [42] read following—

* * *

The Court: No. Section 6 of the Clayton Act would precede the reading of government's No. 5.

Mr. Kenny: But the last instruction you indicated you would give, if the court please, is S-15.

The Court: Wherever I fit in Government's No. 5, that will be. I don't know where I will go from here.

* * *

Mr. Kenney: Defendants' proposed instruction No. 5 is, therefore, refused over our objection?

The Court: Yes, that's right.

* * *

Mr. Margolis: Does your Honor think we can finish?

The Court: I think we can, because a great many of these are going to fall in the same category. No. 6. [43]

Mr. Kenny: That is defendants' 6?

The Court: Yes. The rule of reason I don't think applies in a price case.

* * *

Mr. Kenny: We concede that it would not under the Socony Vacuum, because it would not apply to a price case where the price to consumers was affected, and whereas in that case there was support buying and factors of that kind. But we urge most vigorously that the rule of reason does apply to original producers where consumer prices are not affected.

The Court: You have touched that in a number of other instructions, but I can't agree with you. I think that the rule of reason does not apply in a price case, and that was definitely settled by Socony Vacuum, so No. 6 will be refused.

Mr. Rubin: That is, if your Honor please, that the rule of reason, as I understand it, applies except with respect to price fixing it is per se unreasonable?

The Court: It does not apply in a case where your evidence and everything goes to a conspiracy to restrain trade by fixing prices. Or saying it shortly: It does not apply in a price case.

No. 7, in the things that are related it is covered, and in the other things it is not in the case. [44]

Mr. Dixon: That's right.

Mr. Kenny: I think, your Honor, that is an attempt to overcome an interference that they are accused of violating Section 2.

Mr. Dixon: The indictment speaks for itself.

Mr. Kenny: If it does we are entitled to have it spelled out.

Mr. Rubin: They are not accused of doing a lot of things.

The Court: I will read the particular section of the law and the indictment of what they are accused of doing. I think this: In the portions that it does relate it is covered, and otherwise it is confusing and immaterial.

On No. 8, it seems to me that all of the matters set forth in it are immaterial, except, possibly, your subparagraph 7 and maybe 11, and 7 is covered otherwise.

Mr. Rubin: With respect to 11, we submit the question of diminution or increase is immaterial.

Mr. Margolis: Does your Honor take the position—I just want to get this clear—there is, of course, this law to the effect that fish may not be allowed to deteriorate, that is the California law,—is it your Honor's position that a combination for the purpose of achieving that objective cannot be defended under the Sherman Antitrust Act if it results in a diminution or restraint of the flow of fish? [45]

The Court: Let me answer your question by saying this: It seems to me that all of that is immaterial in connection with the charge made here that they conspired to restrain the commerce in fresh fish by fixing the price in the manner charged in the indictment. In other words, they can have the law regulating it in California and you can have all these other things still true, and it is all immaterial in connection with the charge whether they did or didn't.

Mr. Margolis: Here there is a regulation which makes it mandatory upon these fishermen to prevent the destruction of fish. Is it an interference with commerce to take steps to prevent—to further conserve?

The Court: I don't think that is material. I will [47] refuse the instruction in its entirety. Paragraph No. 7 I think is covered by other instructions, and Paragraph No. 11, about which there was some question in my mind, I think should not be given because the charge is not made that they seek to limit the production of fish. The whole thing is a price case, and could not be appropriately brought into argument by the government other than to argue to the effect that by limiting the price they would limit the production by preventing any production. In other words, "Our price or no fish."

* * *

Mr. Kenny: Just before that, and while it is fresh in the court's mind, would not, then, we be entitled to an instruction that the defendants are not charged with limiting the production of fish?

The Court: No. I don't think so.

Mr. Margolis: If your Honor please, one more matter on that. We contend from a series of exhibits, particularly W-2, which got in, and some other exhibits——

Mr. Kenny: W-1.

Mr. Margolis: W-1, I guess it is, that the entire purpose of the defendants, the real objective of the defendants——

The Court: Let me get in mind W-1.

Mr. Margolis: W-1 as the letter which called off the picketing. [48]

The Court: Yes.

Mr. Dixon: It is the June 30th letter.

Mr. Margolis: And other evidence, the testimony of witnesses, and also the June 11th exchange of letters, and so forth, that the real objective of the defendants was to set up a procedure whereby they would know before they went fishing what price they would get for the fish on that trip, in other words, that they wouldn't have to go out and fish blind, and that the agreement that was proposed was merely one means of obtaining their objective, and that the real thing that they were after, the real purpose of the agreement among the fishermen was to know what price the fish was before they went fishing. And then I direct your Honor's attention—whether the evidence says that or not is, of course, a question for the jury to determine—to point 6 of proposed instructions No. 8: “whether it is reasonable for fishermen, whose labor is rewarded by the price at which their catch is sold, to know and determine in advance the basis, or rate, at which they will be compensated.”

The Court: That goes to the reasonableness.

Mr. Margolis: Maybe the word “reasonable” there shouldn't be used, but I think there should be an instruction to the effect that if the purpose of the agreement among the defendants was to establish some system by which they would know and determine the rate at which they would [49] be compensated, that that is not necessarily a violation of the antitrust law; that that purpose is not.

Mr. Dixon: That is just the point. It certainly is. It couldn't be anything but a price-fixing agreement.

The Court: I think if an individual fisherman under the government's theory of this case negotiated with each one a separate contract, that it would not be a violation of law. Their theory is that they combined and conspired that every fisherman should do that or not fish.

Mr. Margolis: One of the things the June 11th exchange of letters provided was it would negotiate separately for each individual fisherman with simply the union representing them in those negotiations, for each individual trip. We have that evidence in there. Does the mere fact that the individual for whom the negotiations are being conducted is represented by a union in those individual negotiations make it a violation?

The Court: I think that is covered by the government's instruction here on the Fisherman's Marketing Act. I will decline 8. Let's get on.

No. 9 Let's set aside No. 9 for a moment.

No. 10 I think is covered by government's 5.

Mr. Kenny: What are you setting aside?

The Court: No. 9. You have three instructions in there all relating to that same matter. I thought when I [50] got to the last one that we would take the three of them. The subject-matter is a matter upon which I think the jury should be instructed.

No. 10 is declined because I think it is covered and is not a correct statement of the law. In other words, it goes on to the proposition that the defend-

ants are workers, which I think is covered by the government's instruction No. 5 with the reading of that section of the Clayton Act.

No. 11 is the same idea.

No. 12 is covered by the Marketing Act instruction of the government, which is government's No. 4.

* * *

The Court: No. 12 I think is covered by the government's instruction No. 4. That is to say, I think that the subject-matter is covered by government's instruction No. 4. Your position is not the same as that taken by the government.

No. 13—

Mr. Margolis: No. 12 is refused, your Honor?

The Court: Yes. No. 13 I think is an incorrect statement of the law and is declined.

Likewise No. 14. That is the original producers, a subject we were discussing a while ago.

* * *

Mr. Kenny: That, of course, goes to the heart of our contention that the law is designed to restrain activities of middlemen and not as against producers.

The Court: That I cannot agree with.

On that matter, as I say, I think it is an incorrect statement of the law, so it is declined.

* * *

Mr. Kenny: We would like to amend our proposed 14. On line 11—

Mr. Margolis: First of all, line 5.

Mr. Kenny: Yes, to insert the word "working" before "producers."

The Court: On line 5 and 11?

Mr. Kenny: Line 5, and then on line 6 insert "working" fishermen, and on line 11 insert "working" before "producers."

Then I think we would like to offer separately the last sentence of instruction No. 14 as an instruction.

* * *

No, it is still declined.

No. 15——

Mr. Dixon: Well, that is wholly incomplete, Judge. The difficulty with that is——

The Court: The subject-matter is covered generally.

Mr. Dixon: That's right.

Mr. Kenny: We would like to amend the proposal to strike out the word "as" in line 3 and put in lieu thereof the word "working."

The Court: 15 is refused.

16 is of the same general nature and is refused.

Mr. Margolis: May we just look at it for a moment, your Honor?

The Court: 17 again goes into reasonable return and we have discussed that general subject-matter. It is refused.

18 I think is covered by Government's 5 and the section of the Clayton Act, the subject-matter of it.

Mr. Kenny: Wouldn't that serve to clarify the naked language of the Clayton Act when it was read?

Mr. Rubin: It is not going to be naked; it is going to [53] be followed by Government's 5.

Mr. Margolis: This deals with individuals. If Government's 5 is proper to deal with organizations, to clarify and extend the language on organizations, this ought to be proper to extend the language with regard to individuals, what they may do.

Mr. Rubin: That doesn't follow, in my opinion.

Mr. Kenny: This goes to the activities as individuals.

Just for digression, Section 17 of the Clayton Act represents Senator Cummings' amendment which went to the simple language that the labor of a human being should not be an article of commerce. Then the balance of it was the House Committee Amendment that was worked up on a Sunday afternoon affecting labor, agricultural and horticultural organizations. There are those two phases in Section 17. This goes to the Cummings Amendment to the Clayton Act.

Mr. Rubin: If your Honor please, that again goes to the question of whether laborers are exempt under the provisions of the Act as such. That is all the second paragraph refers to. The first paragraph states the contention, so that isn't any law; and the second one, which apparently is an attempt at a statement of law——

The Court: I think 18, the subject-matter, is covered, as I view the law, in government's 5 and the reading of the Clayton Act. [54]

19 I think is an incorrect statement of the law.

Mr. Kenny: I think there we would like to insert "working" on line 5 before the word "producers."

The Court: All right. 19 is declined.

20, I think the general idea is all right, except the last sentence, “* * * then it is your duty to immediately find such defendant or defendants not guilty.”

* * *

Mr. Kenny: We will be glad to withdraw the word “immediately.” Where is that?

Mr. Margolis: Line 24.

The Court: The subject-matter is covered, but if you want it I can put it in again.

* * *

Mr. Margolis: Does your Honor want to indicate at what point that will be given, or do you want to leave that until later?

* * *

The Court: I think that can go back in our general instructions.

Mr. Dixon: That could go after Government’s 8, your Honor.

Mr. Rubin: It is repetitive of 8.

The Court: It is repetitive. I will strike out the word “immediately.” I will make that following 8 and before defendants’ S-15.

Mr. Margolis: Before defendant’s 1, then, or after defendants’ 1?

The Court: S-15.

Mr. Kenny: Defendants’ 1 has so far been indicated as coming ahead of—there is 8, and then 1, and then 15. But you will probably put it after 8, that would probably be the place.

The Court: Yes, it follows 8, government’s 8.

Wait a minute. Government's 8, defendants' 1, and defendants' 20. It will follow defendants' 1.

Mr. Kenny: Very good.

The Court: Coming to the "S" instructions.

Mr. Margolis: Now we are in a bad spot. Mr. Andersen has all of our copies.

Mr. Kenny: We can work it out here.

The Court: S-1, "You are"—you don't need to take this. [56]

(Court reading the instruction referred to.)

The Court: I think it is incorrect, and I think it is confusing, and the O.P.A. didn't mean that people had to charge the top prices.

Mr. Kenny: That is true, but the Emergency Price Control Act said that the prices set by the O.P.A. and the Administrator should be governed, that he should put prices at a fair and equitable level, taking into consideration these factors: costs, profits, and the public interest. And the jury should be told, we believe, that an agreement merely to obtain merely what the law told the Administrator of the O.P.A. to get, that those prices, even if your Honor should leave out—we would offer the first sentence separately, your Honor.

The Court: I don't think so. It was not the conception, as I view the Office of Price Administration, Emergency Price Control Act,—and I have certainly had it argued plenty before me—that they intended to establish uniform prices. They intended to establish maximum prices.

S-1 is rejected.

S-2 is the same subject-matter as your No. 9, and I will lay that aside. Your original No. 9 That is about picketing.

* * *

The Court: S-3, there isn't any evidence here about a row between the American Federation of Labor and the Congress of Industrial Organizations of a substantial nature, and it seems to me it would be confusing.

* * *

Mr. Margolis: We will withdraw that.

The Court: All right. Withdraw it.

S-4: Incorrect. And the subject-matter is covered by government's No. 4.

Mr. Kenny: Is it incorrect to say that they are in the same economic category as agriculturalists and horticulturalists?

The Court: That is an argument. No. 4 is declined.

S-5 covered by government's No. 5 and the Clayton Act. You have got your working producer in there.

S-6—— [58]

Mr. Kenny: S-6 has this virtue, the naked reading of the Act does not include an instruction such as the government will get on their No. 5 when that is read. That is the last paragraph: "If you find that the defendants acted as members of an organization in which labor was the basis or one of the chief factors, they did not act in restraint of trade," and so forth.

The Court: No, I think that it is incorrect.
S-6——

Mr. Kenny: Could I amend the proposal?

The Court: Surely.

Mr. Kenny: On line 20 of S-6, strike out the words "they did not act in restraint of trade, and."

Mr. Dixon: It is still not a correct instruction in our judgment, your Honor.

The Court: That is covered by government's 5, the subject-matter is.

Mr. Kenny: There is nothing in government's 5, if the court please, that tells anybody that they should find anybody not guilty, and that is what we want. Furthermore, we would like—the ever-cautious Mr. Margolis suggests, and I will comply, that we should offer each paragraph of S-6 as a separate instruction.

The Court: All right. S-6 declined as amended.

S-7, the subject-matter is covered by government's 4.

Mr. Kenny: But there again this gives the factors which [59] would—what about the last paragraph, "You should ignore the evidence relating to picketing and boycotting"?

The Court: That is the subject-matter of your No. 9, and S-2 and your S-9, which I will get to in a moment.

Mr. Margolis: I just want to make one suggestion, your Honor. I think that the defendants' instructions should be considered from the standpoint of whether they are correct or not; not whether they are covered by the government's instructions, because——

The Court: The subject-matter is covered by the government's instruction is what I mean to say, and——

Mr. Margolis: My point is that the government naturally tried to state the instruction in a way most favorable to itself.

The Court: I thought they were pretty fair.

* * *

Mr. Margolis: May I state there is a difference of opinion on that. But we do think that this ought to be considered as to whether it is a correct statement of law, and if it is, then the mere fact that it is covered by one of the government's instructions should not mean that we have to accept the government's statement.

The Court: Maybe I did not make myself clear. When I say that it is covered by the government's instruction, what [60] I mean to say is that the subject-matter is an appropriate one to instruct the jury on, that the subject-matter is covered by the government's instruction, and I think correctly stated by the government's instruction No. 4.

Mr. Margolis: And incorrectly stated in ours, your Honor? Because I think the latter is the real question that I think your Honor should consider.

The Court: Your statement of the—it isn't correct in that it isn't completely correct.

* * *

Mr. Kenny: We will offer each paragraph separately, in addition, your Honor. [61]

* * *

The Court: I think the government's position there is correct. S-7 will be declined.

S-8. It generally states your position about the independent working producers in another way.

Mr. Kenny: Your Honor, it also does this: I wrote that after I read the government's proposed 5, because the government is leading your Honor right into the teeth of the N.L.R.B v. Hearst and Milk Wagon Drivers' case.

The Court: The Milk Wagon Drivers' case I didn't think applied. I got it out and read it again this morning.

Mr. Kenny: They were sellers. It occurs all the way through. You have got insurance salesmen who are in unions. Many of the Teamsters' groups are not on any regular pay roll; they are dependent upon commissions entirely. And this position of the government's that you have to be on a regular pay roll would have the most far-reaching effects on dozens of instances that are conceivable where there is organization.

The Court: As I see the government's position it isn't precisely that. It is that and that the buyers of fish don't control the fishermen; they don't control where he fishes [62] or when he fishes.

Mr. Dixon: Right.

The Court: And in these other cases as I read them there is sufficient measure of control to have warranted the conclusions that they were labor unions.

Mr. Kenny: I cite also Dubinsky's union has

many units in the Ladies Garment Workers who work at home, who are piece workers and work on materials.

Mr. Dixon: There is always in those cases an element of control, such as getting the material from them. It is the property——

The Court: Yes, I got them both down this morning and read them again, because his instruction——

Mr. Margolis: Isn't that a question of fact here on which we are entitled at least to the instruction? There are elements of control. What the market dealers will take. We found the relationship here often exists of debtor and creditor out of which we contend certain elements of control exist. There are all sorts of factors which actually result in control. Now, whether that control brings it within this rule or within the other rule depends upon the findings of fact as to control. We contend there is a great deal of control as a practical matter; that there is complete dependence.

Mr. Kenny: Plus the difference in bargaining power——

Mr. Margolis: That is the heart of the Hearst case. [63] And we think at least an instruction ought to be given on the question of law and let the jury determine it.

The Court: It may be on No. 5 of the government's instructions, that there should be some modification to the statement therein about the relationship of employer and employee.

Let me lay that aside.

S-9, I will lay that aside to take up with your No. 9 and S-2. That again has something to do with picketing and boycotting.

S-10. The subject-matter is covered by the government's 5, which I think correctly states the law.

* * *

Mr. Kenny: We would like to amend S-10 by striking out the sentence on lines 7 and 8.

The Court: "If Local 36 is in fact a trade union, the defendants should all be acquitted by you"?

Mr. Kenny: Yes. And insert in lieu thereof "If they are acting solely in self-interest and not in collusion with other economic groups.

The Court: You should acquit the defendants?

Mr. Kenny: Then on line 17 insert the same language that I inserted, after the words "labor union," insert that language, and then I would strike out the words "to so find," [64] in line 17, strike out "so find, and". "it is your sworn duty to acquit the defendants."

We offer S-10 as amended both in its entirety and each paragraph and sentence separately.

The Court: All right. That is declined.

Now, S-11, that is the text of the Fishermen's Marketing Act. I don't know. I have a question mark there. I am wondering if that ought not be read just prior to government's No. 4. In other words, give it the same treatment. Any objection to that?

* * *

Mr. Margolis: Reading the Act just by itself doesn't mean anything.

Mr. Dixon: I thought the judge stated he would treat this the same as he did the other, which would put—I mean the law, the terms of the statute—before the instruction.

The Court: I think the latter part of that can go out here, but something might be said about the fact that the jury can acquit the defendants at the end of the other charge, and I will insert that to be read here and to be considered when we get to the government's. So your S-11, that portion of the Act will be read just prior to 4, Government's 4.

Mr. Kenny: In its entirety, your Honor?

The Court: Except the last paragraph on that page, and we will discuss that when we come to government's 4.

Mr. Kenny: Very good.

The Court: S-12, well, that is the same notion. I think the subject-matter is correctly covered by the government's 4 and your S-11.

Mr. Kenny: It will be if No. 4 is amended, your Honor. You see, we have cited the Stark County case and the other [66] cases covering collective bargaining associations and the government's 4 does not give us the benefit of that determination. If No. 4 is amended——

The Court: Your S-12 is a different view of the law than the government's 4.

Mr. Kenny: That's right.

The Court: And I think the government's 4 more nearly correctly states the law, as I view it.

Mr. Kenny: In other words, it is your Honor's view that a collective bargaining group that bar-

gains for future prices to be paid its members for commodities to be delivered directly to the contracting buyers at the prices agreed upon in advance through their association is not within the purview of the Fish Marketing Act or the Capper-Volstead Act?

The Court: No. I think S-12 is not a correct statement of the law.

Mr. Kenny: We are saying in S-12 virtually that, are we not?

The Court: I don't think so. I think Government's 4 covers the Act with reading the Act, and S-12 will be declined.

S-13, it looks to me like that is confusing. The word "co-operative" I know you mention it several times, but I don't know how this can appropriately fit into the case.

Mr. Kenny: Well, there is in the minds of the jury, [67] undoubtedly, many of them who have had experiences with co-operatives, and as we know, there are many types of co-operative, and we are here seeking, just as we did with the word "conspiracy," to maintain that conspiracies don't necessarily mean a special type of connotation.

The Court: I read the Act to them and then I instruct them on what I conceive to be the application of that law here, and I don't mention the word "co-operative."

I think that it ought to be declined, and I will do so.

S-14, that is the same general idea on the labor.

Mr. Kenny: The first paragraph is a statement of the law of California. [68]

The Court: It is immaterial.

Mr. Kenny: That they have no title and must dispose of them.

The Court: It is immaterial. The second one is the same thing.

The third paragraph, fourth paragraph and fifth paragraph are matters relating to Section 6 of the Clayton Act and I think are covered, so S-14——

Mr. Kenny: There, again, as to the third and fourth paragraphs——

The Court: Third, fourth and fifth paragraphs.

Mr. Kenny: Yes, they serve to give our theory of how the jury can apply the Clayton Act which you were about to read to the jury for the benefit of the defendants. If government's 5 is given we would like to have our theory.

The Court: You can't do like Judge Lindsey used to do, just take everybody's instructions and give them all. I have to decide what the law is. I think theirs more nearly correctly states the law. S-14 is declined.

S-15 is given as modified.

S-16 goes into the reasons for the rule and is of the same nature as one of the other instructions, it is in the nature of argument and it will be declined, as is also S-17.

Mr. Margolis: Can we have just a moment, your Honor?

The Court: Yes. And 18, 16, 17 are declined. 18 I think is confusing and doesn't have any place in the case.

Mr. Kenny: Well, your Honor, there has been, if you recall, Exhibits 224 and 225 introduced by the government, the Santa Monica agreements, which were closed shop agreements, and the jury we believe should be told that because that is a turning point in the law suit in the Northern District that this contract and the proposed conspiracy is one for an open shop agreement.

The Court: I think it is immaterial, and that will be declined.

Mr. Margolis: Does that finish our proposals?

The Court: That finishes your originals and your supplemental theories.

Mr. Rubin: First supplemental.

The Court: And the second supplemental, except for those that I have laid aside. I will take those up now.

Mr. Margolis: Your Honor has laid aside S-2 and 9?

The Court: I have laid aside No. 9, S-2 and S-9. They all relate to picketing.

Mr. Kenny: Was S-8 laid over, do you recall? My notes may be wrong.

The Court: No, that is not correct. That was the newsboys' thing. That was declined. Wait a minute. 8 was laid over. Your No. 9, your S-2 and S-9 they all relate to the general subject-matter of picketing, strikes, boycotts, [70] and so forth. I don't find anything in the government's instruction which I believe meets the situation which ought to be covered in these instructions to the jury, although I have repeatedly stated them from time to

time throughout the trial that the defendants here are not charged with striking or picketing; that that is merely to be considered by them as evidence as to whether there was or wasn't the alleged conspiracy. In other words, you do not charge them with the actual restraint; you charge them with conspiring to restrain trade.

* * *

The Court: In other words, I don't think the jury ought to go out thinking they had a strike down there and tied up fishing, so we are going to convict them.

Mr. Rubin: I agree with your Honor's statement. It is material under our instructions with respect to the right to do certain things under the Fish Marketing Act, also. We probably will get to that when we consider our instructions. I think your Honor's statement is correct that they are not being charged with these specific acts, and I think the jury has been so advised.

Mr. Kenny: You don't contend that they couldn't picket or boycott to obtain an agreement under the Fish Marketing Act, do you? [71]

Mr. Rubin: We certainly do.

Mr. Dixon: Very definitely. If they are a fishermen's co-op they certainly can't force a contract on somebody which is a contract which fixes the prices that they agree upon.

Mr. Margolis: Did they say "we will only sell our commodities at a certain price"?

Mr. Kenny: Couldn't they advertise their dispute just as the man out on Sixth Street with the shoes?

Mr. Dixon: Here you come to the dilemma of the defendants: You want to be a labor union and a co-op at the same time. And the action which you took or which was, rather, taken the nature of the picketing and boycotting and everything else, was taken as a labor union. Of course, I don't think it makes any difference whether it is taken as a labor union or anything else, if it is part of a plan to force a contract on someone which wouldn't be a legal contract.

Mr. Kenny: Whether you are a labor union or a guy with a pair of shoes that doesn't fit, whether you are a Negro group that would like to be employed, or whether you are a dairy farmer, it is no offense against the Sherman Act to picket or boycott, and probably not an offense against any State law.

Mr. Rubin: To picket or boycott isolatedly.

The Court: Per se. [72]

Mr. Dixon: We don't deny that.

Mr. Rubin: But here there are other factors besides picketing and boycotting.

Mr. Margolis: If the objective of the picketing and boycotting is illegal, then of course under this complaint the picketing and boycotting is admissible to prove participation in illegal activities. But if the objective is legal then the picketing and boycotting certainly aren't illegal.

Mr. Rubin: You assume that the objective is legal because of the Act.

Mr. Margolis: No. no. All we want is an instruction to the effect that if what the defendants were trying to obtain was not a violation of the Sherman

Antitrust law then the picketing and boycotting do not make it a violation.

Mr. Rubin: The only reason, as I understand the argument of counsel, the reason that—their contention is, your Honor please, their position is that the contract as not illegal because of the Marketing Act, that is an exemption to the Sherman Act.

Now, that isn't legal per se. If it is legal at all it is legal because it is covered by the Act. Now, then the question is whether or not the Act makes that legal because it is simply an isolated contract, or whether that exemption is not taken away from it because you endeavored to enforce the contract. You are assuming an exemption—— [73]

The Court: Let me see if I can say something. I started to bring it out.

“Evidence has been admitted in the case of picketing and boycotting. These acts, in and of themselves, are not contrary to or in violation of the Sherman Act under which this proceeding is brought. They are to be considered by you as evidence in your determination as to whether the defendants did or did not conspire as alleged in the indictment.”

Now, that seems to me to be the law.

Mr. Margolis: I wonder if in instruction No. 9 you can say in that last sentence there—perhaps a little rephrasing of the last sentence, in other words, “You are not concerned with the means used by the defendants, but you are only concerned with whether the agreement is an unreasonable restraint of trade.”

Mr. Rubin: That is not the charge, and it doesn't fit in with the possible defense of compliance with the Marketing Act.

The Court: I think what I have stated there at least covers my notion of what the law is and should be given to the jury as a clarification to them of a lot of the evidence that has gone in, so that they will not be prejudiced in their determination of the question that they have to answer by the acts and conduct of the defendants in the picketing. [74]

Mr. Dixon: On that phase of it, I think your Honor understands that this is an affirmative defense.

The Court: I understand.

Mr. Dixon: It is set forth in our instruction No. 4, which we feel is clearly supported by the language, whether it is dictum or otherwise is immaterial, because of the reason it makes sense, to us at least, and in our view correctly states the proposition frequently referred to in some—well, in the Hinton case to the effect that as a business association they cannot force or do those acts which other people in similar circumstances cannot do. That the Fishermen's Marketing Act, so-called, does not give them any more right than the right to organize together for the purpose of selling their product, as is stated in the Act. That when they go beyond that, then they come within the purview of the Sherman Act and are subject to it, and that is what our instruction No. 4 is intended to convey, that proposition of law.

Mr. Margolis: Suppose they will say, "We will withhold our product off the market until we get a certain price," that is exactly the same sort of a coercive tactic as is used by labor when they say, "We will withhold our labor until we get a certain wage."

Mr. Dixon: You are dealing now as a business organization and not a labor union. The difficulty with your position, [75] in my judgment—it is only my opinion, of course,—is that you don't recognize the distinction between the two classifications.

The Court: All right. Just a minute. Do you see any objection to the instruction I dictated?

Mr. Dixon: No.

The Court: Do you see any objection to the instruction I just dictated?

Mr. Kenny: I think as far as it goes.

Mr. Margolis: That's right.

The Court: I don't think it ought to go any further. If I do, why, then I will get into the realm of commenting on the evidence, which I don't want to do.

Mr. Kenny: This instruction S-2 is one that should be given, and that is the general instruction of what the right to picket is.

The Court: I think that is covered by my instruction, that there isn't anything in the law to prohibit their picketing.

Mr. Margolis: We would like to offer the two paragraphs of S-2 separately. We think at least the first paragraph ought to be given.

Mr. Kenny: Because it is the only way that the issue between the government and ourselves will be resolved by the court. That is, the government is going to argue, obviously, [76] from what they have said here, that labor unions are the only people who could picket, and——

Mr. Dixon: And that only if there is a labor dispute.

Mr. Kenny: That is what the government is going to argue, your Honor, and it is important that the government be set straight. That is not the law. That is part of the free speech that has been guaranteed and has been spelled out in *Swing v. A. F. of L.*, *Senn v. Tile Layers*, in our own California cases.

Mr. Rubin: All labor cases, every one of them, and the theory of them is that there is no conspiracy among the picketing group to picket.

The Court: I think basically anybody can picket if they want to, because the only reason that labor is given the right to picket is because they have the right to free speech.

Mr. Kenny: Correct.

Mr. Rubin: As an individual. That is where the cases go off, if your Honor please. That is, it is mere coincidence that they happen to be in one particular place at the same time.

The Court: I don't think so. They might have a perfectly legitimate objective.

Mr. Kenny: Your Honor's last statement is the one that we agree with, and it is in direct conflict with what Mr. Rubin said. We are going to

be in this position, unless the [77] first paragraph of S-2, or something like that is read: I will be arguing to the jury about the man picketing out there on Sixth Street and he will be arguing that only in a labor dispute can you picket.

As I see the first paragraph of S-2 it expresses exactly what the court has just stated to be the law.

Mr. Rubin: We will accept the court's instruction.

The Court: "Evidence has been admitted in the case of picketing and boycotting. These acts in and of themselves are not contrary to or in violation of the Sherman Act under which this proceeding is brought. They are to be considered by you as evidence in your determination as to whether the defendants did or did not conspire as alleged in the indictment."

Now, let me see. "* * * of any law."

Mr. Kenny: Yes, I think that would be better than the "Sherman Act."

Mr. Margolis: I wonder if you would say, instead of the word "conspire," "enter into an agreement"?

The Court: No. "* * * did or did not combine or conspire * * *." I want to stick to the charge in the indictment.

Mr. Margolis: Will your Honor consider the first paragraph of S-2?

The Court: This covers it. "* * * in violation of any law."

Mr. Margolis: I would also like to direct your attention to S-9. I think, certainly, the last sentence

—perhaps if you say, “If you find that the combination or conspiracy, any alleged combination or conspiracy entered into by the fishermen,” and then the rest of it.

The Court: I see your point. Wait until I get this other one.

This sentence would be added, “If you find that the defendants did not so combine or conspire then you should disregard such evidence of picketing and boycotting for any purpose.”

Mr. Kenny: That is better.

Mr. Rubin: That brings us again to the question of No. 4. Our thesis is this: that ordinarily combinations of businessmen to fix prices are illegal under the Socony case. The defendants say they are given the right to do that under the terms of the Fishery Marketing Act, which is, in effect, an exemption; and we come back and say that while they may have the right to make contracts under that Act, they do not have the right to force those contracts by these coercive tactics upon other people. So that actually in determining whether or not they have the right to do what they did do, under the Act, whether the Act is a defense, the jury must consider whether these coercive tactics were used. The last sentence would take away from the jury that evidence. [79]

The Court: I don't think so.

Mr. Dixon: Will you read it again, your Honor?

The Court: You have to prove your conspiracy and combination.

Mr. Rubin: That's right.

The Court: The evidence of the picketing and boycotting as admitted for what purpose? To prove that they did agree and conspire.

Mr. Rubin: And for the purpose of showing—the second part of the charging paragraph: and to prevent non-dealers from obtaining fish.

Mr. Margolis: That there as an agreement to do that.

Mr. Rubin: That is part of the conspiracy, that is correct. Now, what the defendants are endeavoring to do is to accomplish the same thing as in their S-2, and that is if the agreement under the Act is legal then the question of picketing is immaterial. But our position is that you cannot determine whether the defense is available under the Act without determining whether or not as part of the conspiracy they used these coercive tactics, because the Act doesn't permit them to use these coercive tactics under our theory, so that evidence is important from that respect.

The Court: Let me read it again.

“Evidence has been admitted in the case of picketing and boycotting. These acts in and of themselves are not contrary [80] to or in violation of any law.”

Mr. Rubin: We agree.

The Court: “They are to be considered by you as evidence in your determination as to whether the defendants did or did not combine or conspire as alleged in the indictment.”

Mr. Rubin: That's right. It doesn't say solely for that purpose.

Our argument will be this: The defendants are going to say if the contract is legal under the Act then it doesn't make any difference what they did to get the contract across, or in any event it doesn't make any difference whether they picketed to submit that legal contract. Our position is there is nothing in the Act under which they are claiming exemption, mind you, which must be strictly construed, there is nothing in that Act which says that you can get that contract through picketing and boycotting methods.

They are endeavoring to obtain the exemption by the use of extra—not extra-legal but extra acts apart from the Fisheries Marketing Act itself.

The Court: I don't know that picketing is a coercive act, nor is boycotting.

Mr. Rubin: In and of itself. But we submit that the jury has the right to determine whether or not these things were done for the purpose or forcing this contract on the dealers, under the second portion of the charging paragraph, [81] and they have a right to determine that. Your Honor isn't going to comment on the evidence, but that was the purpose of it. As a matter of fact, Mr. Kibre testified that the purpose of the picketing and boycotting was to get the dealers to sign the contracts. If that is so the jury has the right to determine whether or not that is so. Then we submit they do not have the right to do that under the Fisheries Marketing Act. That is the reason we object to the last sentence.

Mr. Kenny: The simple answer is that the Fisheries Marketing Act didn't restate the Bill of Rights and the Constitution of the United States.

Mr. Dixon: Of course not.

Mr. Kenny: And the rights to advertise a dispute, coercive though they may be, are guaranteed as a matter of freedom of speech, and that is what the court is saying in his instructions.

Mr. Rubin: But not for the purpose of consummating an illegal act.

Mr. Margolis: If the agreement is illegal——

Mr. Rubin: What counsel assumes is that any agreement among these fishermen is legal per se. The only reason that the Fisheries Marketing Act comes into being is because it is an exemption, it is an exception to the Act, and therefore must be strictly construed. It is a defense to the Act. And for them to obtain that defense, which they didn't have [82] before, they must conform specifically to the terms of the Act and not go beyond the Act. That is the only thing that makes this contract legal. Otherwise it would be simply a straight price-fixing contract. The only thing that makes it legal from their viewpoint is there is an Act that says they can do it.

If that is so, they must stay within the terms of the Act, and these coercive tactics take them out of the exemption, and we submit the evidence is material for that purpose.

* * *

Mr. Dixon: I mean my point is if they are a cop, and that is a question of fact, of course, and it

is defensive material, whether they are this, that or something else is for the jury to determine, but if they are then we say that the law applicable to co-op Fishery Marketing association is that they may not do the things as we have outlined them in instruction No. 4. And if your instruction that I heard you give is intended to exclude that, then I would say certainly we would feel that it is not only not the law, but poor law and was given to business organizations rights which could properly be exercised for legitimate purposes of a labor union.

The Court: The mere fact that the defendants might picket or boycott does not take them out of Fishermen's Co-operative Act in my judgment.

Mr. Rubin: Except if its purpose is to enforce a contract on third persons. The Act doesn't permit them to do that. All the Act says is they can make such contracts. It doesn't say they can ram them down the throats of individuals.

Mr. Dixon: Nor to monopolize the markets, for example. They are not charged with that here, but that equally holds true.

Mr. Rubin: All the Act permits them to do, if your Honor please, is to permit them to get together and act as an association, just as a cooperation would, that is all the Capper-Volstead Act was for.

Mr. Margolis: Can they get into negotiations and say, "Unless you pay 20 cents a pound for fish you are not going to get any fish"?

Mr. Rubin: That isn't the purport of this instruction.

Mr. Margolis: When you talk about coercive tactics, that is what they are doing.

Mr. Rubin: No. they are not withholding their fish from the market. They are picketing and boycotting for the purpose of compelling the dealers to sign that contract, and that is even your avowal.

Mr. Margolis: They negotiate for that purpose. They [84] say, "We will sell you fish at a certain price for that purpose."

Mr. Rubin: "And if you don't take our contract you don't get any fish." And we submit the Marketing Act doesn't permit that.

Mr. Kenny: I can summarize it in 10 words. What Mr. Rubin contends is the Constitution does not apply to a cooperative; it doesn't apply to an individual, it does apply to a labor union, or other persons who might act collectively, but it doesn't apply to a cooperative, that is what he is saying.

Mr. Rubin: It doesn't apply to a co-operative for the purpose of accomplishing that which the Act specifically gives them the right to do under certain limits.

Mr. Kenny: Men can act collectively and express collectively through freedom of speech anything that does not offend some existing law.

You are saying that does not apply to this isolated group.

Mr. Dixon: There, again, it seems to me they are off on a tangent. To get back to a similar situation: the language of Judge McCulloch in the Hutchinson case, the theory set forth——

Mr. Rubin: You mean the Hinton case.

Mr. Dixon: Yes. That it failed to disclose that a fishermen's co-operative could do anything other than what a [85] normal business man could do, and that the purpose of the co-operative Act was to merely permit individual fishermen to join together to collectively fish, market, and do those things specified in the statute, period. And then the opinion goes on to say that it didn't give them rights beyond that, and I submit that it doesn't. There is nothing in the law to indicate that they can do that.

Now, the indictment here charges that they conspired to fix the prices and to prevent the dealers from—who would not sign the agreement, Exhibit A—from getting it, which we submit——

The Court: I don't think that this is contrary to your conception of the law.

Mr. Dixon: It may not be.

The Court: As I view the law, they can be a Fishermen's Co-operative Marketing Association and still violate the Antitrust law. But the mere fact that they might picket or boycott doesn't make them violate the Antitrust law.

Mr. Rubin: In and of itself. The other sentence goes on further. In and of itself. As I understand your Honor's instruction, they are not being charged with the crime of picketing and boycotting because that isn't a crime. We wholeheartedly agree. Your Honor is limiting the consideration of that evidence solely to that question. We submit that that evidence is material in determining whether or not these people have done things beyond that which

the Fisheries Marketing Act permits them to do, and it should be considered for that purpose. [87]

Mr. Kenny: I suggest that that may be considered when we get to No. 4. We have many objections there.

* * *

Mr. Margolis: There is no combination or conspiracy charged in the indictment.

The Court: If you haven't a conspiracy here as you charge in the indictment then you haven't anything.

Mr. Margolis: It wouldn't make any difference if they went out and killed somebody, as far as this indictment is concerned.

Mr. Rubin: But you see, your Honor please, they are arguing in a circle. I have argued in circles before and probably will do so many times again, but their position is that this is a legal means to accomplish a legal objective. Now we submit that even though picketing be a legal means, nevertheless when it is combined with a price-fixing arrangement that that does not fall within the purview of the marketing act, but becomes an illegal means of accomplishing an illegal object.

* * *

The Court: I will read the whole thing. It is short.

“Evidence has been admitted in the case of picketing and boycotting. These acts in and of themselves are not contrary to or in violation of any law. They are to be considered by as evidence in your determination as to whether

the defendants did or did not combine or conspire as alleged in the indictment. If you find that the defendants did not so combine or conspire, then you should disregard this evidence of picketing and boycotting for any purpose."

Mr. Margolis: You can say you can acquit.

Mr. Dixon: No.

Mr. Margolis: That if they did not combine or conspire, then there should be an acquittal.

Mr. Rubin: I think that is a better instruction. There is nothing wrong with that instruction.

Mr. Margolis: The point is, we want that in there also to emphasize the fact that the picketing should be disregarded.

Mr. Rubin: But the picketing shouldn't be disregarded in order to determine whether there has been a conspiracy.

The Court: Then you should acquit them, because if they did not combine and conspire then there is no crime committed.

Mr. Margolis: Then of course they disregard the picketing.

Mr. Dixon: We don't want the last sentence.

The Court: The last sentence is changed.

Mr. Margolis: How is it going to read?

The Court: "If you find that the defendants did not so combine or conspire, then you should acquit the defendants."

* * *

Mr. Margolis: I didn't ask for that change to be made. I said we could go that far.

The Court: We have gone that far.

Mr. Margolis: But we are here asking your Honor to do something short of that, because that is what will make that instruction clear.

Mr. Kenny: It really is contrary, as it is now stated, with the oral instruction you gave the jury at page 97 in the transcript.

Mr. Rubin: That is the same thing as the judge paraphrased in the first portion of it.

Mr. Margolis: May I ask this, your Honor, if there is no combination——

Mr. Kenny: Let the judge read page 97 of the transcript.

The Court: “I do not think the Government is trying [90] to convict the defendants here of picketing. But there is no use of discussing a proposition such as this before the jury because I might make some remark on the law that might prejudice one side or the other. Let it be sufficient to say at this time that I now overrule the objections and will admit the two photographs in evidence as Exhibits 1 and 2.”

Mr. Margolis: May I say this, your Honor, if there is no combination or conspiracy proved, and they must acquit, then doesn't it follow that it is correct to say that they must disregard the picketing?

Mr. Dixon: That is the end of the case.

Mr. Kenny: I would also like your Honor to read your colloquy with counsel at page 767 of the transcript, which is illuminating. It was largely encouraged by that which caused us to draw up the instruction.

Mr. Margolis: I just can't understand about that. If there is no proof of a combination or conspiracy then for whatever purpose it is in the case they must disregard it.

The Court: They must acquit them.

Mr. Dixon: They must acquit them, period.

Mr. Margolis: But isn't that also equally true that they should disregard the picketing?

Mr. Rubin: Then they must disregard all the evidence [91] for that matter.

Mr. Dixon: That is a very fair instruction, your Honor.

The Court: From the evidence so far in the case, I do not see why—I was looking again at that instruction this morning—it would seem to me that I would have to instruct the jury, in the event the case gets that far, that the admitting of evidence concerning strikes and pickets are only admissible as evidence in your determination as to whether the defendants did or did not combine or conspire as alleged in the indictment. In other words, the defendants are not being tried for picketing or striking.

Mr. Kenny: Now the word "only" is not in this instruction as we have it, and that is a very important word.

Mr. Rubin: The purpose of the picketing is to substantiate the charges.

The Court: That matter is settled, gentlemen. I will give the instruction as I read it to you.

That completes those. Now let us take up Government's Exhibit No. 1.

Mr. Margolis: No. 1 in effect says you must disregard the Clayton Act and you must disregard the Fishermen's Marketing Act.

The Court: I follow that immediately by the instruction—well, there is one instruction about price-fixing, then the Fisheries Marketing Act and then would be an instruction. [92]

Mr. Margolis: But you say here it constitutes a violation of law.

Mr. Kenny: What line?

Mr. Margolis: Line 29. If you find all of these things it constitutes a violation of law, and bang out goes the Fishermen's Marketing Act and out goes the Clayton Act. They just can't consider it.

Mr. Kenny: In other words, it does not take into consideration any of the exemptions.

Mr. Dixon: The exemptions are covered under the other instructions and the affirmative defenses.

Mr. Margolis: Without considering the instructions, you say it constitutes a violation of law?

Mr. Dixon: That is right, under the theory of the indictment this states the law. Now you have set up affirmative defenses and I submit again that is an affirmative defense.

Mr. Margolis: Then you should say it constitutes a violation of law and in the absence of exemption under the Clayton Act or under the Fishermen's Marketing Act.

Mr. Dixon: No. All that is required then is to show, as we view the law, under what circumstances you would not be guilty as contended by the defendants. Frankly if I may finish, Mr. Margolis, we don't think on the evidence that has been adduced

in this case that there is the necessity to charge [93] under the cooperative act or the labor union provision, because we don't think the evidence adduced brings us under either one of them, but in the interests of making certain here that that issue is presented to the jury, since you have indicated that that is your defense, we have drawn and submitted to the Court the instructions on both of those possibilities.

* * *

Mr. Margolis: Why give instructions on the Fishermen's Marketing Act and why give instructions on the Clayton Act when this knocks it out?

The Court: But I give them an instruction that they cannot single out any particular instruction but must take them all into consideration.

Mr. Dixon: That is our contention. There are later instructions to cover your defenses but one is distinctly our contention.

Mr. Kenny: I think the Court intends to qualify that bald statement.

Mr. Dixon: It is like the association of any [94] other group of businessmen that might get together and do those things.

The Court: I think that that can be left as it is and the matter would be clarified by inserting at line 23 after the words "conspiracy or combination," to make it read, "then I charge you as a matter of law that a conspiracy or combination as alleged in the indictment of any such fisherman for the purpose of fixing, establishing and maintaining the price" constitutes a violation of the law.

Mr. Dixon: We have no objection to that.

The Court: In other words, say here, if they are independent businessmen then they are not a labor union and they are not a cooperative, and they have engaged——

Mr. Kenny: Wouldn't it be helpful, your Honor, if you put "are solely independent businessmen" on line 19?

The Court: They have not alleged that. I would just add after "conspiracy or combination" the words "as alleged in the indictment."

Mr. Kenny: Wouldn't it be helpful, your Honor, if after the words "independent businessmen" you added "and not a cooperative or workers?"

The Court: No, I think not. Then I would have to go to work on your other instructions and say if they are cooperators and not independent businessmen or are independent businessmen, and so forth. I think this straightens it out meets [95] your objection. In other words, if they are independent businessmen, if they did the things as alleged in the indictment, then it is a violation of the law.

Mr. Margolis: But independent businessmen can combine under the marketing act.

The Court: Not as alleged in the indictment.

Mr. Dixon: That is correct.

Mr. Rubin: The fact that they can combine is set forth in a subsequent instruction.

Mr. Dixon: And the conditions under which they may combine.

The Court: The objections to Government's Instruction No. 1 are overruled.

Mr. Dixon: Then the words are added?

The Court: On line 23, after the word "combination" I have added the words "as alleged in the indictment."

Mr. Margolis: It seems to me that there should be the same sort of modification here that there was with respect to the instruction on picketing. You said that picketing standing alone in that instruction—I think it should read, if you find these facts standing alone.

The Court: No, I do not think so. I think in view of the others that this fairly presents the matter.

Mr. Margolis: May the record show we object to this instruction upon each and every one of [96] the grounds stated in our discussion of the objection without repeating it?

The Court: Yes.

Now the next is Government's Instruction No. 2. I think that is correct. I read the Socony-Vacuum case again.

Mr. Margolis: To begin with, your Honor, we object to the whole instruction.

Mr. Kenny: I think "floor" should go out because there is no floor. There was no support buying here.

The Court: I think there isn't any evidence of a floor.

Mr. Dixon: Oh, yes, there is, your Honor. The minimum prices. This is a floor case. The agree-

ment was that they should be the minimum prices.

Mr. Kenny: I think the floor has an entirely different meaning in the law and in the concept of the jury. "Floor" means——

Mr. Dixon: Below which they may not go. It is generally referred to, your Honor, as a floor in price-fixing cases. That is why we used the term.

Mr. Kenny: We would rather have "floor" than "minimum" because the floor is obviously not there. There are enough men with business experience on that jury to know what a floor is.

Mr. Margolis: We want to object to this also on the ground that it is an incorrect statement of the law, that the Socony-Vacuum Oil case, on which it is based, applies only to situations where [97] there is a sort of combination which has a tendency to affect consumer prices, and also that it applies only to combinations in which there is something more than a mere agreement with regard to prices, but there are artificial means, such as buying up and keeping products off the market, which artificially raises and maintains the price to the consumer and does not apply to a situation where competition remains in the market by virtue of competition with other products and the price to the consumer is not necessarily affected.

We also want to object to this instruction on the same ground as we objected to Instruction No. 1, that it practically throws out the defense of the Fishermen's Marketing Act and of the Clayton Act, Section 6 of the Clayton Act which we have referred to. And also as to this particular objec-

tion, it should at least state that if you find these facts alone and no other facts, and that leaving that out makes the instruction incorrect upon the second ground of objection.

Mr. Kenny: Furthermore, I have one other point, and that is, that the words "market prices" as used in line 16 means, in the Socony-Vacuum case, maximum prices to consumers and not market prices to those who buy for resale, and market prices as it stands here undefined simply cannot be understood by the jury. [98]

* * *

Mr. Kenny: If we aren't allowed to have any instructions on the rule of reason, they certainly shouldn't have any instructions against the rule of reason. What is sauce for the Government is the goose for us evidently.

Mr. Dixon: It is the language taken at page 222 and 223 of the case itself. I don't know what better authority we could give than that.

The Court: On Instruction No. 2, on line 15, I will change "which serves" to read "which may serve;" and also "which prevents" to read "which may prevent." So that latter part will read "a floor which may serve the function of increasing the stability and firmness of market prices and which may prevent the determination of those prices by free competition alone."

Mr. Kenny: This also, as the other instruction, does not give the jury any guidance as to what market we are talking about.

Mr. Dixon: It is the only market charged in the indictment. [99]

The Court: Very well. The objections to Instruction No. 2 are overruled with the changes noted, the addition of those two words.

Now we come down to Instruction No. 4.

Mr. Kenny: No. 3.

The Court: No. 4. No. 3 comes in later. I will read this portion of the text of the act first and then follow with this.

Mr. Kenny: My first objection would be at line 8, "at which the association itself or as sales agent for its members." Now that clearly does not take into consideration the Stark County case and numerous other cases of bargaining cooperatives, where it is merely a cooperative agency.

The Court: It is a sales agency. That is what they are doing.

Mr. Kenny: They are not selling. They don't take title.

The Court: They are a sales agent for its members. I can strike out "sells the fish," or is it your theory that they must take title to the fish?

Mr. Dixon: They are selling the fish caught by the members, your Honor. They are selling it directly or as sales agents. I don't think the question of title enters into it there at all.

The Court: This must be confusing then—"enter into a contract with a buyer of fish which [100] provides for and then fixes the price at which the association itself or as sales agent for its members sells the fish * * *"

Mr. Kenny: Your Honor wipes out every bargaining right then.

The Court: I do not think so.

Mr. Margolis: But they don't have to sell the fish. They can bargain for the fish, the price at which the fish can be sold.

The Court: What is the difference?

Mr. Margolis: They are going to make a difference on it.

Mr. Kenny: That is what the Government is going to make a difference on. In other words, there are dozens, in every perishable commodity there are dozens of bargaining cooperatives. We have given you numerous citations to that effect. And it is a common practice, particularly in the perishable commodity field. At which the association itself sells the fish or negotiates for prices at which the members sell and deliver the fish.

The Court: Suppose at line 8, "at which the association itself or as sales agent for its members," suppose we strike out and say "which provides for and fixes the prices at which the fish caught by the members of the association is sold to a buyer."

Mr. Kenny: Good.

Mr. Rubin: I don't think that is the law, [101] your Honor please. I don't think that a cooperative has the power to do that. A cooperative either functions as a business organization or as a sales agent.

The Court: I leave "sales agent" in there.

Mr. Rubin: Their sole function in this particular case is that they are simply negotiating the price

at which its members will sell to the dealers, and that is all the evidence here shows.

Mr. Kenny: That is right.

Mr. Rubin: We submit that that isn't the thing that the Fisheries Marketing Act contemplates at all. That isn't marketing.

Mr. Kenny: How does the Government overcome the definition of marketing, because in Dr. Schneider's testimony——

Mr. Rubin: Dr. Schneider's testimony isn't in evidence, in the first place; and in the second place this little pamphlet that you submitted yourself to the Court indicates that an organization of some sort is necessary, and it distinguishes between the bargaining agent type of labor union organization, with respect to canneries and with respect to fresh market dealers.

Mr. Kenny: I have also submitted Stockdyke's book in which he refers to bargaining cooperatives. I have told the Court, and he knows, of three dairy cooperatives right here in this county that operate that way, one in San Diego, one in asparagus, and another one. [102]

Mr. Dixon: Rather than sales agent?

Mr. Rubin: I don't know how they function in detail, but we do know how this organization functions in detail and we don't think those come into this at all. As a matter of fact, they may be illegal, as far as I know.

* * *

Mr. Kenny: Will you yield for two minutes?

I think that this is tremendously important that

we come to grips with this one because this is one where the Government is either very right or a lot of people are very wrong. And, as I say, it is in the Farm Security booklet. Judge Holbrook's book refers to this type of a bargaining cooperative, and it is referred to in Stockdyke's book and it is referred to in the book on Economics of Cooperatives, and also the definition is given in Exhibit GG-1 for identification. I haven't it before me, but it is very clear. And these books weren't written for the case, they were published in 1937 and 1936. It is probably the most critical legal question that we have been confronted with here.

The Court: Beginning on line 5, "when formed for such purposes, an association may," then quoting the law, "have marketing agencies in common and such associations and its members may [103] make the necessary contracts and agreements to effect the purposes of marketing." Have you the law before you there?

Mr. Dixon: Yes, your Honor.

Mr. Rubin: Of course there again we are diametrically opposed in argument to the jury as to what constitutes marketing.

The Court: They are going to have to decide that, I think.

Mr. Rubin: Is that a question of fact, how marketing is construed?

The Court: Maybe not.

Mr. Dixon: As I indicated before, I gave considerable extended thought and consideration to this instruction.

Mr. Kenny: Your Honor, if you will recall in the Stockdyke book he mentions financing cooperatives and he says, the bargaining cooperative doesn't need any financing because it merely bargains and the members deliver directly.

The Court: Yes. He talked about not having an office.

Mr. Rubin: But the word "bargaining" is interpreted by the author of that book. The term "bargaining" can refer to a lot of situations. They may be the principals and the beneficiaries of that bargaining and not the parties of the bargaining.

* * *

Mr. Kenny: Your Honor, in this regard we were to consider our proposed Instructions S-8 and S-12, which does have the matter of the bargaining agent or sales representative. There is language in our S-12 which might be helpful.

* * *

The Court: Let me see if this would resolve the differences: "When formed for such purposes,"—there isn't any evidence here that an organization was collectively catching their fish or preparing it or processing it or handling it? [105]

Mr. Kenny: That is right.

The Court: There is only the marketing.

Mr. Margolis: One of the things, when you come right down to it there, I think it should read "when formed for any such purpose" instead of "for such purposes."

Mr. Kenny: Any of such purposes?

Mr. Margolis: Because obviously it doesn't require them to collectively catch, collectively produce, collectively prepare for market, collectively process to collectively handle.

The Court: The statute uses it in the conjunctive.

Mr. Margolis: Yes, your Honor, but it is a permissive statute. It says they may do all of these things. If they do something less than the statute permits, that is all right. Otherwise then what it means is if they caught and marketed but did not process the act would not apply.

The Court: No. Leave that as it is and say, "When formed for such purposes, such an association may, on behalf of its members, maintain marketing agents for the products of its members and may make the necessary contracts and agreements to effect such marketing."

Mr. Kenny: I am behind you here.

The Court: The language is in the act. "Such as, may have marketing agencies in common and such associations and their members may [107] make the necessary contracts and agreements to effect such purposes."

Mr. Kenny: We are still behind you.

The Court: I am just reading the law here.

Mr. Margolis: I wonder if we could have read back the language which your Honor suggested.

The Court: I can give it to you. "When formed for such purposes, such an association may, on behalf of its members, maintain marketing agencies for the products of its members and may make the

necessary contracts and agreements to effect the purposes of the association."

Mr. Kenny: That leaves to the jury the decision of whether there is a cooperative marketing agency, which is a question of fact.

Mr. Rubin: The word "marketing agency". I don't think would be helpful to the jury, in my humble opinion, if your Honor please, because they are going to argue that this is just a marketing agency and we are going to have to say that they must do more than fix the price at which their members will individually sell to the dealers. That will be the argument made before the jury. [107]

* * *

The Court: Do you see any objection to that? That is taking the language of the statute.

Mr. Dixon: The only objection I see to it, your Honor, and that is the reason we made this instruction in the form we did, was that the jury may not know what the instruction encompasses. They may be confused by it and may come back and ask for further instruction from the Court.

The Court: I do not see how this language that I have lifted from the act is any more confusing than the language that you have. I am inclined to doubt that to come within the provision of this act the association must take title.

Mr. Dixon: I don't think so. They can act as a sales agent, and that is precisely what they do. But they are selling something, because that is the purpose of the cooperative act, to enable them to pool together to sell their products, and that is why

we feel that if they don't sell anything, or act as a sales agent for any of their members in selling anything, that they are not a cooperative.

Mr. Kenny: You have got your hands full if that is the case. You have them all over western America. And there are long discussions in [108] all the books about the question of taking title.

Mr. Rubin: They can sell on behalf of the members; they don't have to take title.

The Court: Why not say, "The association itself or as sales agent for its members sells on behalf of its members the fish caught?"

Mr. Rubin: I think that is perfectly all right, and that is the law.

Mr. Kenny: Your Honor, that is the vice in this thing. They don't have to sell on behalf of the members. They merely fix the price at which the members do sell and deliver. That is the vice of the thing and the language of the statute—we have it here—but if the Government prevails they would have you put something in the statute that is not in it.

Mr. Rubin: The whole purpose of these cooperative statutes, if your Honor, please, is to give these people the combined power as though they were a separate entity to compete with large cooperative groups.

Mr. Margolis: They do it through bargaining. That is one of the most accurate statements you have made. We agree with you.

Mr. Rubin: We submit that the stockholders of a corporation don't sell the products; the corporation sells the products. [109]

Mr. Kenny: This is the onerous implication of the Government's position, and that is that they want them to be a much more integrated combination than the one that they are.

Mr. Rubin: That is right.

Mr. Kenny: I think that really flies against the philosophy of the antitrust law.

Mr. Rubin: That is something else again. You have to have some entity there that can be held responsible for these things. That is the purpose of this.

* * *

The Court: I think that this would be an accurate statement, "sells on behalf of its members the fish caught by the members." That is on line 8 after the word "sells."

Mr. Kenny: We have written all this other in. Is that out now?

The Court: I think that is better. The way it is here now "may on behalf of its members maintain marketing agencies for the products of its members and may make the necessary contracts and agreements to effect the purposes of the association." [110]

Mr. Kenny: Yes.

The Court: I am inclined to think that is a little more confusing than the last one.

Mr. Rubin: So it reads how now, your Honor?

Mr. Margolis: Referring to your language.

The Court: I am referring to my language.

Mr. Margolis: To be left in?

The Court: To be left out and the instruction given as it is.

Mr. Margolis: Do I understand by your Honor's instruction to mean that the intent of this instruction is to say to the jury that an association which collectively bargains for its members to set the price at which the members will sell their products does not come within the purview of the Fishermen's Marketing Act?

The Court: That is not what this says.

Mr. Margolis: That is the effect of it.

The Court: What I am saying is that the price at which the association itself or as sales agent for its members sells on behalf of the members the fish caught by the members of the association.

Mr. Margolis: But, your Honor, the effect of that then—I think we are entitled to know whether that is your Honor's intent—the effect of that is to say to the jury that a bargaining agency fixing the prices at which members sell their product [111] cannot be covered by the Fishermen's Marketing Act. Maybe that is what your honor has in mind.

Mr. Rubin: I think your Honor's statement is an exact statement of the law.

The Court: I think under the law here as it is written, and as I read it, that this instruction accurately describes it.

Mr. Margolis: May I ask your Honor this question—I would like to understand that one thing because we are going to have to be guided in our argument by these instructions—it is our contention that a collectively bargaining agency that simply collectively bargains for prices may come under the act if it conforms to the other provisions of the

act, may come under the act. Now I think we ought to know whether your Honor's instruction is intended to preclude that.

The Court: I think on the position you have just stated that that is a matter of argument and I doubt if I can or should formulate an instruction to the jury that goes beyond this. Of course you have to keep in mind that the rest of this instruction here elaborates upon this first sentence.

Mr. Margolis: If your Honor please, if it is a matter for argument——

The Court: Now if I instruct the jury in this, that it is a sales agent, that it may be an association which itself or as sales agent sells on behalf of [112] its members the fish caught by the members of the association, then the jury has to decide whether or not they did or did not sell on behalf of its members from the evidence in this case.

Mr. Margolis: But the point is, your Honor, does that mean that they must sell, actually sell, the fish?

The Court: You mean, do they have to take each fish and sell it?

* * *

Mr. Margolis: That is what the Government is going to argue that your language means.

The Court: That they must take the title to the fish?

Mr. Rubin: No.

Mr. Margolis: Or that they must actually say, "We are selling you a boatload of fish." But they cannot bargain to say, "For the fish that is sold you

for the next year or for the next six months you will pay a certain price." That you can't do.

The Court: I think your latter statement is not the law, that they cannot under the Fishermen's Marketing Act sit down and bargain that the price of fish for a year shall be such-and-such and so-and-so, or fix a formula for fixing it. I think that, as this instruction points out, they must be arrived at by free and voluntary negotiations so that the competitive element enters into it from time to time as the fish are sold. [113]

Mr. Kenny: Let me get this straight, your Honor. What they are bargaining for or selling is futures in fish. The fish has not been caught. It is just as the milk has not been produced from the cow, or the crop has not been harvested. I take it that your Honor is not saying that it would be a violation of the marketing act to sell in advance.

The Court: Of catching?

Mr. Kenny: Of catching.

The Court: I am not saying that.

Mr. Kenny: That is good.

Mr. Margolis: I wonder then, "sells the fish caught or to be caught," if that isn't better.

Mr. Kenny: That would help.

Mr. Margolis: At least that ought to be in there.

Mr. Kenny: Caught or to be caught. That would be a great help, your Honor.

* * *

The Court: All right. Caught or to be caught by the members.

Very well. Let's go on.

Mr. Kenny: Of course I like "free and voluntary" if it means as within the language of the Allen Bradley case and others. In other words, I take it your Honor is meaning by that instruction that they must not collusively rig up a deal [114] with the middleman because if they freely and voluntarily and openly negotiate I think perhaps——

Mr. Margolis: The trouble is that that would be construed as meaning if you have picketing then it ceases to be free and voluntary.

Mr. Rubin: That is correct. That is precisely our position there, that that is not permitted within the exception to the Sherman Act.

Mr. Dixon: Not as a cooperative.

Mr. Margolis: That gets down to whether that constitutional right extends to others, and the language if it is left in there will be used by the Government precisely for that purpose.

Mr. Kenny: If the language is meant to mean that they can't conspire vertically and enter into agreements that are collusive and not agreements that are obtained as the result of open bargaining, that is one thing. That is what I read into it.

The Court: Down on line 17 I think that I should strike out the word "coercive"—do not make your changes on that until I finish—"enter into such a contract by coercive practices and tactics which are not free and voluntary."

Mr. Margolis: There is a question of what that will mean to the jury. [115]

The Court: They have to decide that just as in all kinds of cases they have to decide whether the fellow is guilty or not guilty.

Mr. Margolis: I wonder if there couldn't be a sentence added there, that to use the words "free and voluntary" is in contradistinction of a collusive combination.

* * *

Mr. Rubin: We are talking about two different things now, counsel. One is an Allen Bradley case and the other is the means used.

Mr. Kenny: We read Allen Bradley into the language and you read *Lowe v Lawler* into it.

Mr. Rubin: I think the Allen Bradley matter is included also later on.

Mr. Margolis: The problem, as I see it, is that the way this thing will be left the Government will argue that what that instruction means is that if you get a contract as a result of picketing, that picketing is a coercive tactic, or that such a contract is not a free and voluntary contract.

The Court: I think the next one straightens it out: "Such a contract entered into between the defendant association and a buyer or buyers of fish under the latter circumstances would be one in which the price was fixed by one party to the contract and the price would therefore be an arbitrary, [117] artificial and non-competitive price."

Mr. Kenny: That is quite true, but the evidence shows that they were seeking an agreement of two parties.

The Court: The jury has to decide that.

Mr. Dixon: That is right.

The Court: The jury has to decide whether it

was fixed by one party. In other words, it is not free and voluntary if one party comes in and says, "Pay this or else."

Mr. Kenny: Or else no fish.

The Court: Or else anything.

Mr. Margolis: I am just wondering if we have to apply that to the cases to determine what your Honor means. Does that mean if a bargaining association of this kind presents a contract and says, "These are our demands, we won't deliver fish to you unless you pay us this price," and the dealer then says, "All right, in order to get fish I will enter into such a contract"——

The Court: That is what the charge is here.

Mr. Margolis: Taking those as the accepted facts——

Mr. Dixon: That is what the jury is to decide.

Mr. Margolis: Taking those as the accepted facts, would that be a free and voluntary contract?

The Court: The Government is charging here that it was a conspiracy to obtain just a contract in just such a fashion and that it is violation of the law. [117]

Mr. Margolis: I am talking now about what your Honor's instruction means.

The Court: I know, but my instruction is trying to at least be consistent.

Mr. Margolis: My only problem is that I am trying to find out—you see, free and voluntary can have so many different meanings. Free and voluntary can mean——

Mr. Dixon: That is for the jury to decide.

The Court: I think that is for the jury to decide.

Mr. Dixon: As I said, your Honor, we don't think the defendants have brought themselves even to a position, from an evidentiary point of view, where they would be legally entitled as a matter of law for this instruction, but since it is their defense, if the jury thinks it is a defense, I think they are entitled to have it at least submitted to the jury in the interests of the defense going to the jury, even though from a practical point of view, or from our point of view, there isn't any evidence at all to support the defense.

Mr. Margolis: I don't see how there can be a contract in which the price is fixed by one party. And a contract is an agreement. The whole thing to me just doesn't make sense.

The Court: Lots of contracts have been entered into that people have had set aside because they were not free and voluntary. [118]

* * *

Mr. Margolis: I wonder if it would be necessary at this time to restate our objections or may our agreement be considered as objections?

The Court: Yes. Surely. What I had intended to do in connection with the record in the case was to go instead of signing all of these instructions and indicating on each of them, to have this portion of the transcript become the part of the file and take the place of any written rulings of the judge on the instructions, and the instructions as read to

the jury and transcribed by the reporter to be in the instructions given rather than to sign "refused," and so forth.

Mr. Margolis: That is very good. [119]

The Court: In this way this gets in all of your argument.

Mr. Margolis: All of our argument is considered as made in objection form then?

The Court: That is right.

Mr. Kenny: And of course our proposed instructions will be part of the record, your Honor?

The Court: They will all be here.

Now I will read that first portion of your S-11 just before that and follow with Government's Instruction No. 4.

Now Government's Instruction No. 5, everybody agrees to that, so we will just pass on.

Mr. Kenny: I can't seem to lay my hands on it.

The Court: We will have a short recess.

(Short recess.)

The Court: We will now take up Government's Instruction No. 5.

Mr. Kenney: That is where we start parting company with the Government as this is generally used and understood, that is, beginning on line 7, the third sentence of the first paragraph.

Mr. Dixon: That is Justice Frankfurter's conclusion.

Mr. Kenny: The point is, it doesn't make any difference how the term is generally used.

The Court: I was thinking that the next [120] sentence explains it without that sentence.

Mr. Kenny: It certainly would be better.

The Court: I think that is sufficient here.

Mr. Dixon: I think, your Honor, that is probably correct.

Mr. Margolis: The word "independent producers" is from the Hinton case?

Mr. Dixon: No.

Mr. Margolis: It is inserted here.

Mr. Dixon: It is from Note 5. You will find the reference on page 976.

Mr. Margolis: But not the words "independent producers."

Mr. Dixon: Yes, I think it is in there.

Mr. Rubin: I think it is too.

Mr. Dixon: It is some time since I read it, but we can quickly find out.

Mr. Margolis: First of all, our feeling about the thing is that this instruction is completely unnecessary because the question, as we see it, is not whether Local 36 is a labor union but whether Local 36 is composed of persons who are selling their labor, and if so, labor not being a commodity, whether you call it a labor union as that term is used is immaterial.

Mr. Kenny: In other words, we are not pressing the Norris-LaGuardia Act in this case. [121]

Mr. Margolis: That is right. That was a Norris-LaGuardia Act case.

Mr. Kenny: Nor are we pressing Section 20 of the Clayton Act.

Mr. Margolis: We are pressing Section 6 and particularly that portion of Section 6 which talks about labor not being a commodity. The Hinton case was written with special reference to the Norris-LaGuardia Act in which it was absolutely necessary to determine whether or not the association was a labor union. That went to the very heart of the case. We are not claiming any exemption on that basis. We are relying on Section 6 of the Clayton Act, and this simply avoids that issue because the issue under Section 6 of the Clayton Act we are referring to is that labor is not a commodity.

The Court: I think that sentence beginning with the words "as that term is generally used" on line 7 down to line 10 ending with "to some employer," can and should probably come out.

Mr. Kenny: Well, now, the next sentence, it seems to me that that isn't the law, that is, there could be and are self-employed groups who are labor unions. Witness the *Hearst v NLRB* decision.

It seems to me the Government has made its point by getting in the second sentence where it says, "the fact that said defendant association may refer to, act as, or call itself a labor union does not in [122] and of itself make said association a labor union," but they are treading on ground that is not legally secure when they rule out self-employed persons from a labor union.

And, as I say, you have the newsboys case and you have the case of the Hard Rock Miners and others who are what they call leasers and to that

extent self-employed but are labor unions. I think that the Government is asking for something here that just isn't the law.

Mr. Dixon: Even those persons as indicated, those latter persons, stand in the relationship of an employee to some employer.

Mr. Kenny: No, the cases turn on the differences in bargaining power.

Mr. Rubin: No. The Milk Wagon Drivers case doesn't turn on that point. They call themselves employees in the contract. They said they were just technically independent contractors.

Mr. Margolis: What they call themselves doesn't make any difference.

Mr. Dixon: I am saying the Court took those facts into consideration in determining whether or not they are independent contractors or technically employees. They said in that case that the fact that they nominally owned their own trucks, and so forth, that they weren't considered as employees. They were considered as employees in that case, in the Milk Wagon Drivers case. [123]

The Hinton case expressly distinguishes those cases.

Mr. Margolis: But they were technically self-employed, but for the purpose of the Wagner Act, for example, for purposes of other acts, they are treated the same as people who are employees. The point is, you can be self-employed for one purpose and an employee for another purpose.

Mr. Kenny: Not only that, but you can be self-employed for one purpose and band yourselves together to act collectively.

Mr. Rubin: This whole issue is important only with respect to whether or not a labor dispute exists.

Mr. Dixon: That is right:

Mr. Margolis: As I said, we think this is an incorrect statement of the law.

Mr. Kenny: If we were urging here a Norris-LaGuardia Act defense, that would be another matter, but there have been no instructions from us on that.

Mr. Margolis: We are relying on Section 6 of the Clayton Act.

Mr. Dixon: Our position on Section 6 is that that in and of itself does not take collective organizations of labor, laborers, whatever you want to call them, horticultural workers, and so forth, outside the Sherman Act and that was the reason the cases indicated for the passage of the Fisheries [124] Marketing Act and the Agricultural and Horticultural Act.

Mr. Kenny: That wasn't the reason.

Mr. Rubin: This is sort of over-the-counter discussion but how can you consider Section 6 of the Clayton Act without considering the subsequent cases that construed that act, such as *Loewe v Lawler*, and so forth?

Mr. Margolis: *Loewe v Lawler* was before that.

Mr. Rubin: I mean these subsequent cases that followed the cases and the Clayton Act with respect to their exemptions, and so forth, which gave rise to the necessity of the Norris-LaGuardia Act. I don't see how you can take the act itself and stop

at that point, because if you are going to take that act then you also have to take the Supreme Court decisions that construe that act.

Mr. Margolis: The interpretation of the Clayton Act today is far different than it was in the early cases that were decided.

Mr. Rubin: Only because of the Norris-LaGuardia Act, which you are disavowing. I agree with you. I am a lot closer to your position than you think I am, but you did disavow that act.

Mr. Kenny: If the Government wants to extend the Norris-LaGuardia Act to us and say we have a possible defense under it and we have some possible instructions about labor disputes, and so forth, then maybe this sort of thing would be the subject [125] of discussion. But that isn't before us here.

The Court: If I strike out that sentence and change the next sentence, "An association of independent producers or of persons who are self-employed," and then change the "or" to say, "and who are engaged in business on and for their own account and profit, free from such controls as an employer ordinarily exercises over a person who is an employee, would not be a labor union."

Mr. Kenny: That would be all right if you added the language which we have in No. 8.

The Court: I have No. 8 before me. Do you have it?

Mr. Kenny: Yes, the third paragraph of No. 8 says, "Such a circumstance legally exists where the so-called independent contractor or businessman gains his livelihood as the result of his own labor

and the use of his own tools and where, as an individual,"—and this is the thing we need—"he lacks equal bargaining power in his dealing with those from whom his livelihood is gained." That is Justice Rutledge's language.

The Court: No, I just looked at your Instruction No. 8 again. I do not think it fits here. I think that this would cure the basis of your objection. Do you have that language?

Mr. Dixon: Yes, your Honor.

The Court: "An association of independent producers or of persons who are self-employed [126] and who are engaged in business on and for their own account and profit, free from such controls as an employer ordinarily exercises over a person who is an employee, would not be a labor union."

Mr. Rubin: I think that covers the Hearst case and the Milk Wagon Drivers case.

Mr. Dixon: In other words, strike out beginning line 7 with the words "as that term?"

The Court: "As that term is generally used," and ending with the word "employer" on line 10.

You do not agree with that, I take it, and object to it on all the grounds stated?

Mr. Kenny: That is right. It doesn't go the whole way, as we see it.

The Court: I think it covers the basis of your objection. Let us pass to the next paragraph.

Now you come here to the individual, it seems to me, and takes care of the objection which you have been making, except that I think this isn't quite correct.

Mr. Margolis: This says "persons who work for wages or salaries, that is to say, are employees of the fish dealers," which is a departure from the language which your Honor just outlined, it seems to me.

Mr. Dixon: The latter part of that, "or who stand in the relationship of employees to the fish dealers," is intended to cover your latter situation.

Mr. Margolis: It seems to me that it is just confusing to have it—you see, you have, "that is to say." In other words, you equate wages and salaries and employee relationship.

Mr. Dixon: It "consists of persons who work for wages or salaries, that is to say," etc., or "consists of persons * * * who stand in the relationship of employees to the fish dealers."

Mr. Kenny: The difficulty with this next sentence is that it purports to be an instruction favorable to the defendants. In other words, the Court after the comma goes on to say you "may join together and carry on," and so forth.

Mr. Margolis: I think what ought to be stricken is "consists of persons who * * * are employees of the fish dealers or who stand in the relationship of employees to the fish dealers."

The Court: I think that would be enough, "consists of persons * * * who stand in the relationship of employees to the fish dealers." I think that would be sufficient.

Mr. Dixon: All right.

The Court: So we will strike out "who work for wages or salaries, that is to say, are employees

of the fish dealers or," so that it now will read "consists of persons who stand in the relationship [128] of employees to the fish dealers, I charge you that the members of said association may join together and carry on acts to effect changes in the terms and conditions of their employment, even though their acts may affect or obstruct interstate or foreign commerce and that in doing so they would be pursuing a legitimate objective, period."

Mr. Margolis: Where is that?

The Court: Line 21. I strike out the words "of a labor union." That then meets your objection that the individuals are not covered.

Mr. Margolis: Of course we think what should be added there, your Honor, in addition to standing in the relationship of employees to the fish dealers, "or who are selling their labor."

Mr. Kenny: Products of their labor.

The Court: No.

Mr. Margolis: Or the products of their labor. Either one of those two ought to go in.

Mr. Kenny: The word "only" I think in line 23 is objectionable because it does not include the other permissible restraints by joint action.

Mr. Dixon: Such as?

Mr. Kenny: The Fishermen's Cooperative.

Mr. Dixon: No. That has been covered in previous instructions. This is a labor union instruction. That is what you claim you are. [129]

The Court: I think this is related to this matter.

Mr. Margolis: I think from line 31 on to the end of that paragraph should be stricken. That is just the reverse of the other.

Mr. Kenny: You have stated the law and the rest of it is a formula for finding people guilty.

Mr. Dixon: No, I don't agree with you.

Mr. Rubin: That is a statement of what the law is.

Mr. Margolis: It is harrowing what has previously been said, because under your definition it is possible that prices, for example prices of newspapers, are boiled down to wages and when the newsboys get into a dispute with the newspapers over what price they shall pay the newspaper owners, for their newspapers, they do not cease to be employees. The Wagner Act says they still shall apply.

Mr. Rubin: But it says they must find that it shall not affect the employer-employee relationship. That is part of the findings.

Mr. Dixon: We previously pointed out the conditions under which you are protected, and then since you still claim you are a labor union we have to follow out with the other situation in fairness to balance the instruction. It would be one-sided otherwise.

Mr. Kenny: Then the last paragraph, I think your Honor indicated some disagreement with [130] while we were discussing the other motion to dismiss. That is clearly an attempt to hold that if boat owners and non-boat owners are in the same

union, that is a vertical conspiracy under the Brimms case and the Allen Bradley case.

Mr. Dixon: Which we believe is the law, your Honor.

Mr. Rubin: Surely.

The Court: I think that is the law, but that isn't the basis upon which you charge it.

Mr. Kenny: Precisely.

The Court: You allege that they are independent businessmen; you do not allege that it is a combination of independent businessmen and the others.

Mr. Dixon: But you have a situation here where you have the record showing about 54 per cent of them regard themselves as self-employed, and certainly if the balance of them have combined, even though they are employed with somebody else and they are therefore properly engaged in the activities or are members of a labor union, that type of a combination would, under the Allen Bradley case, be an illegal combination.

The Court: I think it would be, but I do not think that that is what you charge.

Mr. Dixon: For the purpose of presenting the position of the Government, you really have to have the situation covered because otherwise the jury might well conclude, this is an organization of businessmen but the instructions don't cover the [131] other possibility, and therefore since they are a labor union perhaps because they have got employees in it, and the record shows that they have people in there who regard themselves as employees, whether for the canners or anybody else, that if

they combined with independent producers or independent businessmen, so-called, we think that the Allen Bradley case would apply if they combined in some organization.

Mr. Rubin: Don't forget that Instruction No. 5 is to be preceded by Section 6 of the Clayton Act. Now with that in mind, Section 6 of the Clayton Act talks about legitimate objectives of these labor groups, and the Allen Bradley case was specific on the question as to these unholy alliances between labor and non-labor groups. That is the reason this is important. If they have the statute there then we have a right to show the modification of the statute by the Allen Bradley case. It might be a legitimate objective of labor, and that was true in the Allen Bradley case, but where it is a legitimate objective of labor, even so it is sought to be obtained in combination with a self-employed group, then that is illegal.

Mr. Kenny: Without debating the law, it is still a brand-new law and a different conspiracy than one alleged in the indictment.

Mr. Rubin: No, it simply modifies the instruction that you want for your defense. [132]

The Court: I think it is covered because I say, "An association of independent producers or of persons who are self-employed and who are engaged in business on and for their own account and profit, free from such controls as an employer ordinarily exercises over a person who is an employee, would not be a labor union." Now that covers the self-employed phase and the man apparently who is a

fisherman who shares without owning his boat who regards himself as self-employed.

Mr. Rubin: If that were the situation and that were the avowal by these defendants, why then I grant you we would not have the necessity for that paragraph. But I don't think that is what it will be. I don't know.

The Court: I think that is a matter of argument.

Mr. Rubin: They are going to argue, "let's say we have 54 per cent who are self-employed," and then they will say, "well, let's talk about the other 54 per cent who are employed." By whom are they employed? Well, they are either employed by one of two groups, either employed by the boat owners or they are going to boat owners," or they are going to contend they are employed by the fish dealers. And that will be the sole purpose of talking about labor at all. In either case, whether employed by the boat owners or the fish dealers, if there is a combination between those employees, if they are employees—and they will so argue, I assume—and non-employees, then of course that is illegal [133] under the Allen Bradley case.

Mr. Margolis: You have to indict them on that. Let's assume that is the correct law, which we don't agree with, then they would have to be indicted on that charge.

Mr. Rubin: Because what we are endeavoring to do is refute your defense. Your matter is defensive matter. We don't have to indict them on that.

Mr. Margolis: But you charge a combination of businessmen.

Mr. Rubin: That is right.

Mr. Margolis: Then you ask a conviction on the basis that it is a combination of businessmen and non-businessmen.

Mr. Rubin: No. What we say is this, if you contend the evidence shows that there are employees here who weren't businessmen, our position is that even if that were so these employees do not have the right to combine with the businessmen, as we have shown under the Allen Bradley case.

Mr. Margolis: And because of that combination——

Mr. Rubin: Because of that combination you do not have the defense of Section 6 of the Clayton Act. It is a defensive matter.

Mr. Dixon: It is not a question of charging a separate violation here.

Mr. Rubin: If you will stipulate in the record that the crew members who are not self-employed are joint venturers or partners, this whole thing can go out, I think. But you won't do it [134] because you are going to argue it.

Mr. Kenny: They are not joint venturers.

Mr. Rubin: Who are they employees of, would you say? The boat owner?

Mr. Kenny: I don't say that they necessarily have to be on a regular pay roll.

Mr. Rubin: Who are they like employees of?

Mr. Margolis: We say the relation between none of these fishermen is the same. There is no difference between the boat owner and the non-boat

owner. One man happens to own the tools with which all of them work, that is all.

But here this adds a brand-new charge to the indictment, a new kind of a thing that we weren't apparently charged with and we weren't prepared to defend against, and weren't given any notice of.

Mr. Dixon: There is no notice required. The facts are——

Mr. Rubin: Just a second. With that last statement maybe we can check it.

(Conference between counsel.)

Mr. Kenny: If this practice of boat owners and boat pullers acting jointly in association is a U. S. v Brimms or a Borden case, why they can go out and indict us for it. But they haven't done it this time. [135]

Mr. Rubin: You go out and defend on the ground that you are a labor union.

Mr. Dixon: Your defense is that you are a labor union. At least that is what your opening statement indicated. We feel that it is necessary therefore to cover, as far as the evidence in this case is concerned, the extent to which that is a defense, and that is the only purpose of inserting the last paragraph of this Instruction No. 5, because otherwise it would be wholly an incomplete instruction on the evidence adduced here. There is still a question of fact for the jury to find, what kind of an organization you are and whether the members of the union, assuming they find that you are a labor union, also conclude whether you are non-employees or businessmen.

Mr. Margolis: But that is already covered.

Mr. Dixon: We haven't covered it.

Mr. Margolis: You say: "If you find as a fact that the membership of defendant Local 36, IFAWA, consists of persons who stand in the relationship of employees to the fish dealers, I charge you that the members of said association may join together * * *" You have already said that.

Mr. Rubin: Suppose you contend that the crew members are employees of the boat owners. Then where does that leave us under that instruction?

Mr. Margolis: We are not making any such contention. [136]

Mr. Rubin: Will you disavow it before the jury? That might solve the question. We have to just anticipate what you fellows are going to argue in your defense, that is all.

Mr. Margolis: Our position is that the boat owners and the boat owners and the boat pullers are in exactly the same relationship to the market dealers.

Mr. Rubin: To the market dealers, but how about the relationship to each other?

Mr. Margolis: There are some differences in their relationship, obviously, but we are only concerned with their relationship with the dealers. But this says, "If you find as a matter of fact that the membership of defendant Local 36 IFAWA, consists of persons who stand in the relationship of employees." Now if you are going to add another charge on verticle combinations, then you would have to amend the indictment.

Mr. Rubin: No. It all depends on whether you contend that is a defense.

Mr. Kenny: The jury could take that one paragraph and decide the case on it. They could rule in our favor on every other thing and say, "Look here, the judge said if boat pullers and boat owners are in combination it is an illegal combination."

The Court: The question here is whether or not under the evidence in this case that boat puller is an independent businessman. [137]

Mr. Rubin: I think that is right.

The Court: That is the question.

Mr. Rubin: And we need that instruction, unless they will disavow the fact that there is no other relationship between the puller and the owner. They might say, "well, the boat puller is an employee of the boat owner, therefore the boat puller has a right to do these things which gives arise to a labor dispute."

Mr. Kenny: There is no privity that arises between the boat puller and the fish dealer by virtue of his relation with the boat owner. That privity exists on a parity with the boat owner's privity.

Mr. Rubin: You and your associate are apart on that then.

Mr. Margolis: No, I said exactly the same thing.

Mr. Rubin: I misunderstood Judge Kenny then.

Mr. Dixon: We feel, your Honor, as I said, that this is an instruction on an affirmative defense. That is the first and obvious point that we want to make. If it is an affirmative defense it is of course directed to the evidence in this case and nothing else.

Now, the evidence in this case already in and not in dispute I think indicates that 54 per cent of these people or more own and operate boats on their own account. The balance [138] of the membership consider themselves as being employees of somebody. All they say is "employees."

Now under the previous portion of this instruction I think they would be entitled to argue that this is a labor union composed in part at least of employees, of somebody, presumably they can then argue they are employees of the dealers, and then the whole instruction about a labor dispute would come into play and the government would be left without any answer to it unless this portion of the situation, where you have a combination of employers and employees, so-called, in the same group, or same conspiracy, would be applicable.

Mr. Margolis: Maybe you indicted these people for the wrong thing.

Mr. Dixon: No, this is an affirmative defense.

Mr. Margolis: Let's knock this affirmative defense thing in the head. They have alleged positively as part of their indictment that the people are not employees, that they do no bargain collectively, that they do not market collectively, and they felt if necessary to make it part of their indictment. They themselves have taken the burden upon themselves to prove it.

Mr. Dixon: And you say they aren't employees.

Mr. Margolis: That doesn't make it an affirmative defense. It is part of this indictment.

Mr. Dixon: The jury is entitled to have the benefit of [139] the full statement of the law covering any situation that may be disclosed by the evidence with reference to labor unions, if that is one of your defenses.

Mr. Margolis: Even though it covers a charge not involved in the indictment?

Mr. Rubin: It is not a charge.

Mr. Dixon: We didn't charge you with being a cooperative, and you have an instruction on that.

Mr. Margolis: But you said we weren't a cooperative.

Mr. Dixon: We allege the fact as set forth.

The Court: The long and short of this paragraph here is what I said a while ago, isn't it, that the position of the government is that they are not employees because they go out and catch fish and sell the fish for what they can, and the position of the defendants is that they are labor, not necessarily that they are employees but that they are labor and exempt under the act, because the wages that they get they get from the fish that they catch. That was a very unclear statement, and if you know what I am talking about, that will be something.

Mr. Rubin: The whole thing resolves itself—we have no way of knowing how they are going to argue these facts so we have to anticipate their argument.

The Court: I understand.

Mr. Rubin: Now if they are not going to argue the question of employee relationship between the boat owner and boat puller, I don't think we need

this paragraph either. If they are, we need it and we are entitled to it. That is our position.

Mr. Kenny: I think we can assure counsel we are not going to argue that. We are not going to argue that the boat owner is the employer of the boat puller or conversely, that the boat puller is the employee of the boat owner.

Mr. Rubin: Or that there is any labor dispute between them?

Mr. Kenny: Or that there is any dispute between them. Conversely, we show that they are all literally in the same boat.

Mr. Dixon: What about a labor dispute between those people who regard themselves as employees of somebody, and the fish dealers?

Mr. Kenny: We will argue that all of them are.

Mr. Dixon: Then we submit we should have this instruction to cover that possibility. Let the jury decide whether they are or are not.

Mr. Kenny: This will give the jury an entirely new theory to rule against the defendants. It would be isolated from everything else and be made the basis for a verdict.

Mr. Rubin: I don't think so.

Mr. Dixon: If they find, as stated here, yes, I agree [141] with you; but they have to make a finding of fact before they can find your clients guilty.

Mr. Kenny: What you have alleged here is absolutely true, that this union includes boat pullers and boat owners.

Mr. Rubin: Then that makes it an illegal combination.

Mr. Kenny: That is right.

Mr. Rubin: That deprives you of the defense of a labor dispute. That is our point.

Mr. Kenny: Of course that is something else. We say it is simply not the law and it is a perversion of the Brimms and Allen Bradley doctrine and something entirely new that has not been urged in the indictment.

Mr. Dixon: If the Court please, I think it could be put this way rather simply: If you have a labor union which is composed of employees——

The Court: Let me write something down. Assume that I omitted the last paragraph, about which you are complaining, but add on line 14 on the first page of the instruction, immediately following what is not a labor union, the following: "In this connection it is not contended by the defendants that any of the defendants have the relationship of employee and employer to any other defendant"?

Mr. Rubin: Of course if you related it to the defendants, if your Honor please, that wouldn't apply. You would have to relate it to the members of the union because obviously [142] Mr. Zafran is an employee of Local 36. It wouldn't refer to the defendants, it would refer to members of Local 36. I think that is what you have reference to.

The Court: Yes. In other words, what I am trying to get around is your idea that the fellow who fishes on a share of the lay is an employee of the fellow who has the boat. That dispute isn't here.

Mr. Dixon: That is right.

Mr. Kenny: That is right.

Mr. Dixon: You might have it though, and I think properly so. They might under certain facts have such a dispute. It is not in this case, however.

The Court: That dispute is not here.

Mr. Dixon: No.

Mr. Rubin: That might suffice, if the further statement were made that it is not contended that there is any different relationship between the boat owner and boat puller, on the one hand, and the dealer on the other.

Mr. Kenny: Wait a minute. Now you are getting off into something else.

Mr. Rubin: No. What you are saying is that the boat owner and boat puller, you stated before, occupy the same relationship to the dealer under your contention.

Mr. Kenny: That is right.

Mr. Rubin: I think if that is added that would suffice. [143]

Mr. Margolis: I think the thing that should be put in there is that it is the contention of the defendants that the boat puller and the boat owner stand in the same relationship to the dealer.

The Court: Stand in the same relationship to the dealer regardless?

Mr. Kenny: Relationship between themselves.

Mr. Rubin: If that is added to the judge's statement, I think that will do it. Then that would take of the relationship to each other and the relationship as among themselves with the dealers. It would make them all employees or all independent businessmen. That is about the effect of it.

The Court: That is right. I think either all of the defendants should be acquitted because they come under Section 6 of the Clayton Act, or none of them should.

Mr. Rubin: That is right.

Mr. Margolis: That isn't necessarily right, for this reason——

The Court: That is absolutely correct.

Mr. Margolis: In spite of the fact that I have made my point, let's assume that the jury were to find that certain of the defendants are not independent businessmen as charged in the indictment——

The Court: Then they have to find them all not guilty.

Mr. Rubin: Pardon me, the defendants or the members, which? [144]

Mr. Margolis: Let me finish.

Let's assume that the jury finds—the point is that this indictment charges a combination of businessmen. If this is any other kind of a combination except a combination of businessmen, they may have violated the law in sixty-six thousand other ways but the indictment has not been established.

Mr. Rubin: That is a question of defense again.

Mr. Margolis: I am not talking about defenses. The point is, one of the things that is charged is that this association is a combination of businessmen. Now they could have been charged as a combination of businessmen plus employees. They could have been charged, and you might have had another good count. But that wasn't charged. Now if it

is established—it is just as if they had proved that they were guilty of murder under an indictment which charges them with a violation of the antitrust laws—they are charged here as an association of businessmen and unless they prove that they are an association of businessmen, it is just too bad.

Mr. Dixon: Not at all, your Honor. I think that is not the law.

Mr. Rubin: And that is precisely the reason for that paragraph, because you are contending that part of these people may be somebody's employees and we say even if it is so it is illegal.

Mr. Dixon: This is a conspiracy charge and one of your defenses is that you have a right to conspire, and your argument and contention is that you have a right to conspire because you are laborers and that this is a labor union, and for that reason you have a right to do the things charged in the indictment.

Now it is one of the questions of fact for the jury to decide, whether or not you are a labor union and, if you are a labor union, what protection if any you have from the law or under the law for doing the things charged in the indictment.

Now this instruction covers the situation where the labor union is involved, and there is a labor dispute involved, and the action must be justified under those circumstances by the defendants and the union. And don't forget that the union is also indicted here.

Now this instruction that you complain of, or that portion of the instruction which you complain

of, deals with the situation where the union itself or its membership is composed of independent businessmen as well as employees, and it is for the jury to decide. And it is one of the things I understand you are going to argue, whether they are employees or laborers or what they are. [146]

Now if you are going to argue that point, then I think the government is entitled to an instruction covering a possibility, based on the evidence in this case where the evidence shows that some of your cards say self-employed and others say employed, which latter designation would clearly to the jury at least indicate an employer-employee relationship with somebody.

Mr. Margolis: Let's assume that a defendant were charged with obtaining property by fraud and deceit. He comes in and proves, as his defense, that he stole that property. He just went in and stole it. There was no fraud, no deceit involved at all. He could not be convicted under a complaint or an indictment charging him with obtaining property by fraud and deceit for having stolen that property.

The Court: They have limited that so that it is just plain larceny now.

Mr. Margolis: I know, but I am just giving that as an example, that you may have a defense to a particular charge which very defense proves you guilty of another crime, and yet it is a good defense to the particular charge with which you are charged.

Mr. Rubin: There is only one crime here.

Mr. Margolis: Let me finish.

Now here either they are guilty of the combination, of the type of combination which is charged in this indictment, [147] or they are not guilty at all. One of their defenses may be that they have a different and entirely different type of organization, that is itself illegal—we will concede that for the purpose of argument—but if it isn't the kind of combination charged in the indictment then there can be no conviction under this indictment.

Now what they are saying here, in effect, is that you must find them guilty whether it is the kind of a combination charged in the indictment, i.e., a combination of businessmen, or an entirely different kind of combination which is not charged in the indictment, a vertical combination of businessmen and workers.

Mr. Rubin: You are absolutely right. They certainly would be because they are not charged with the crime of being independent businessmen, they are charged with the crime of conspiracy, and it doesn't make any difference whether they are independent businessmen or it is a vertical combination.

Mr. Margolis: A combination of independent businessmen.

Mr. Rubin: That is not the charging paragraph. It describes them, that is all. Suppose you charged a man as a white man with murder and he turned out to be a colored man, he would still be guilty.

Mr. Margolis: But who is charged with a combination here?

Mr. Dixon: The defendants named herein, of which the union is one. [148]

The Court: I keep listening to you discussing this and you keep talking about all the members of the union. We only have 16 defendants here.

Mr. Dixon: But the union is also indicted.

The Court: I know, but not all the members of the union. It says here, "If you find as a fact that the membership of defendant Local 36 * * * is a labor union." I do not define a labor union here.

Mr. Dixon: That is right. That will have to be defined, that portion of it.

The Court: Let us take it word for word.

"If you find as a fact"—we will leave that much in—"that the defendant association is a labor union as previously defined"—strike out "as previously defined"—"and if you further find that the members of said union also include non-employees or businessmen who are self-employed"—that is very confusing, or I am confused.

Mr. Dixon: I think the difficulty, your Honor, arises from the fact that we have stricken from the instruction the definition of labor union so that there is no form now to determine that.

The Court: I think I have set that forth: "If you find as a fact that the membership of defendant Local 36, IFAWA, consists of persons who stand in the relationship of employees [149] to the fish dealers * * *"

Mr. Dixon: Would not be a labor union. It is a negative definition. In other words, it doesn't tell them what a labor union may be.

The Court: Suppose we said, beginning on line 9, "If you find that the members of Local 36 include non-employees or businessmen who are self-employed or engaged in the business of catching and selling fish on their own account * * *"

I still think that the matter can be solved by one short instruction which somebody ought to be able to couch to the general effect that all the defendants are in the same boat. I think they are. They either are or they are not. That is, so far as this instruction is concerned, and so far as this is concerned with the defendants.

Mr. Dixon: You see, the Clayton Act uses the word "Norris-LaGuardia Act," "legitimate labor objective," "labor union," etc., and that is why it makes it so difficult. Frankly we spent considerable time on this. It was quite a job to work this thing out. It isn't perfect by a long way.

How about something like this: The members of the defendant association include non-employees or businessmen who are self-employed, and so forth, as well as employees?

The Court: It is immaterial in considering this whether the defendants are guilty or not guilty.

Mr. Dixon: Any defendants whom you find are engaged in [150] such a combination, or combined with independent businessmen. In other words, you have in this case the matter of price-fixing.

Mr. Rubin: Maybe we can do it this way: Take out everything up to the word "defined" so that it reads: "If you find that the members of defendant Local 36 include non-employees or businessmen

who are self-employed," etc., "I charge you that the members of a labor union cannot in the same organization combine with independent businessmen." I think that ought to do it.

Mr. Dixon: "and thereafter engage in any activity or conduct in combination with such independent businessmen which has as its purpose the fixing of prices of fish."

Mr. Rubin: That is right.

Mr. Dixon: I think it would be all right from there on.

Mr. Rubin: Strike out everything up to "and" so that it says, "If you find that the members of defendant Local 36 include non-employees or businessmen who are self-employed or who are engaged in the business of catching fish, I charge you that the members of an organization cannot in or outside their organization combine with." How does that sound?

The Court: How would this be: "In connection with your consideration of this phase of the matter, it is immaterial whether or not any of the defendants owned or operated his own boat or fished for a share of the lay. The matter of [151] whether or not the defendants come under Section 6 of the Clayton Act is to be determined by the relationship of the defendants to the fish dealers and not to one another."

Mr. Rubin: That limits it only to the defendants, whereas the indictment refers to all the members of the union.

Mr. Dixon: The union is indicted here too.

The Court: It is still a defendant and it does not make any difference about the other membership in the union. The defendant Local 36 may have some employees who are deck hands, scrubbers, cooks, water boys, and so forth, but if they did combine and conspire as you alleged here to control the price of fish then they are guilty, so it makes no difference as to what their whole membership was.

Mr. Rubin: Except that they may contend—that is all right if they don't contend that they are employees. They may say that there is a labor dispute here in which case we will be up against another problem.

The Court: That is half of what their whole argument is about. They do say there is a labor dispute, but they say there is a labor dispute because these defendants here are paid by the price of fish.

Mr. Rubin: When you say defendants, would you add in that instruction, “and the members of defendant Local 36”?

The Court: In connection with your consideration of this phase of the matter, it is immaterial whether or not any [152] of the defendants owned—I would say whether a defendant instead of any of the—whether a defendant owned and operated his own boat or fished for a share of the lay. The matter of whether or not the defendants come under Section 6 of the Clayton Act is to be determined by the relationship of the defendants—that is all of them, the union and all the members—to the fish dealers and not to one another.

Mr. Rubin: Judge, I think if I may state, I believe that would be misleading because the jury is then going to consider each individual defendant, just those that we have indicted here.

For example, Mr. Kibre, as business agent, has no relationship to the picture we have been drawing here at all.

The Court: He has a relationship to the fish dealers.

Mr. Rubin: He is the business agent of a union. There has been no testimony at all concerning his relationship to the fish dealers. Actually our problem here is, what is the relationship between the members.

The Court: Yes. There is testimony concerning his relationship to the fish dealers. That is your testimony. And he conceded and admitted on the witness stand that he was arguing with the fish dealers. So it isn't a question of whether Kibre is employed by the union or Zafran is employed by the union or Joe Doakes fished on a share of the lay or George Knowlton owned his own boat. It is a question of what [153] the relationship was with the fish dealers.

Mr. Margolis: As far as the Clayton Act is concerned.

The Court: As far as the Clayton Act is concerned.

Mr. Rubin: When you talk about the union, for example, the union is only important in this case because of the members of the union. Actually what the jury has to decide, as I understand it, is what

is the relationship between the members of the union, not necessarily just those that we have picked out here. We might have picked out people here who weren't even fishermen but who were conspirators. The problem involved in this defense is what is the nature of the relationship between the members of the union who are to be the beneficiaries under this contract. So if you lump the union as a defendant and limit that only to the 16 people before this court they are going to say, "Well, Mr. Kibre, there is no situation there, and Mr. Zafran, he is the secretary-treasurer, and somebody else here only fished two months out of the time, we will just acquit all these people." But the subject of the conspiracy was not their relationship to the dealers but the relationship of the people under the contract.

The Court: We are not talking about the subject of the conspiracy now; we are talking about the contention of the defendants that they are exempt under Section 6 of the Clayton Act. [154]

Mr. Margolis: That is what was wrong with this whole last paragraph because you are talking about the Clayton Act and you get into a question of the conspiracy. The way the judge puts it, it relates to the Clayton Act.

The Court: I see here—and everybody has passed over this with all your objections—on the first page, line 14, "If you find as a fact that the membership of defendant Local 36, IFAWA, consists of persons who stand in the relationship of

employees to the fish dealers, I charge you that the members," and so on. That is all you are concerned with here, it seems to me.

Mr. Rubin: That is the defense. We want to get the converse.

The Court: That the union "consists of persons who stand in the relationship of employees to the fish dealers." Under the Clayton Act, if they find that the membership of that local, that is, all of them, stand in that relationship of an employee to the fish dealer, then they can combine and conspire and a labor dispute exists, and so forth.

Now I am saying here, to eliminate the idea that will get over to the jury possibly, and to eliminate any confusion that they may be employed by some fellow who owns his boat, it looks to me like this covers it.

Mr. Dixon: I have a suggestion here in the alternative, but I won't make it until your Honor is through. [155]

The Court: "In connection with your consideration of this phase"—now that would go right through following line 7 on the second page and would eliminate the last paragraph; that is, this whole phase starts out with the Clayton Act—"In connection with your consideration of this phase of the matter, it is immaterial whether or not a defendant owned and operated his own boat or fished for a share of the lay." Now that takes out any suggestion of possibility here that you are trying to say that they conspired with the fellow who worked for a fisherman and the fellow who owns his boat and was an independent fisherman.

Further: "The matter of whether or not the defendants"—that is the only ones we are talking about, and all of them here—"come under Section 6 of the Clayton Act is to be determined by the relationship of the defendants to the fish dealers." And that is the standard we just set up back here.

Mr. Rubin: Yes, your Honor, with one qualification, that the standard you set up in the first place talks about all of the members and it doesn't refer to it there.

The Court: The defendant Local 36 is a defendant.

Mr. Rubin: Is an entity, that is correct.

The Court: That is right.

Mr. Rubin: But the standard we set up before, which your Honor just read, talks about the members of Local 36, [156] which is an entirely different matter. There are some hundreds of members who occupy different relationships possibly, but here now it is being limited to the second paragraph just to those who are before the jury. That is the reason that the suggestion was, if you said the individual defendants or the members of Local 36, then I think that would come closer to the true situation. You have two standards. The first one talks about the member of Local 36. Local 36 is just an association. It doesn't mean anything. It is just an idea on paper. But when you talk about the members of it, as you did in the first portion of the instruction, then I think we come closer to the true picture.

Mr. Margolis: We are to a point where we are indicting ideas.